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Second report on State responsibility

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Addendum

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II. Review of draft articles in Part One (continued)

C. Part One, Chapter V: Circumstances precluding wrongfulness

1. Introduction

(a) Overview

213. Chapter V of Part One specifies six circumstances precluding the wrongfulness of conduct otherwise internationally wrongful.[393] They are:

- Consent (article 29);
- Countermeasures (article 30);
- *Force majeure* and fortuitous event (article 31);
- Distress (article 32);
- Necessity (article 33);
- Self-defence (article 34).

Chapter V is completed by article 35, which reserves the possibility of compensation for damage to an injured State by an act otherwise wrongful, but the wrongfulness of which is precluded under articles 29 and 31 to 33. That possibility is not envisaged for countermeasures or self-defence.

214. Consistently with the philosophy underlying the draft articles, these "justifications", "defences" or "excuses", as they might variously be termed, are prima facie of general application. Unless otherwise provided,[394] they apply to any internationally wrongful act, whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act, or by reason of its membership in an international organization or from any other source.

(b) The evolution of Chapter V

215. The statement of the general justifications or excuses for non-compliance with an international obligation is a matter of first-rate importance, both for what is included and for what is excluded. The development of the current list of the grounds for non-performance seems to have been as follows:

• *The 1930 Hague Conference.* In view of the replies made by Governments to the questionnaire on the responsibility of States for damages to foreigners, the Preparatory Committee of the 1930 Hague Conference for the codification of international law drafted

[393] For the *travaux* of Chapter V see: Ago, Eighth report, *Yearbook* ... 1979, vol. II, Part One, pp. 27–66 and addendum to the Eighth Report, *Yearbook* ... 1980, vol. II, Part One, pp. 14–70; *Yearbook* ... 1979, vol. I, pp. 31–63, 184–187, 195–208, and *Yearbook* ... 1980, vol. I, pp. 153–194, 220–223, 227–231, 235–240 (plenary debate), *Yearbook* ... 1979, vol. I, pp. 169–175, 233–236, and *Yearbook* ... 1980, vol. I, pp. 270–273 (report of Drafting Committee). For discussions of the justifications or excuses for international illegality in general, see S. P. Jagota, "State Responsibility: Circumstances Precluding Wrongfulness", *Netherlands Yearbook of International Law*, vol. 16, 1985, p. 249; J. Salmon, "Les circonstances excluant l'illicéité", in *Responsabilité internationale* (Paris, Pedone, 1987/1988), p. 89; A. V. Lowe, "Precluding Wrongfulness or Responsibility? A Plea for Excuses", *European Journal of International Law*, vol. 10, 1999 (in press). For discussion of circumstances precluding wrongfulness in relation to human rights, see E. Wyler, *L'illicéité et la condition des personnes privées* (Paris, Pedone, 1995), pp. 183–219.

[394] E.g., by a treaty to the contrary, which would constitute a *lex specialis*: cf. article 37.

a number of Bases of Discussion.[395] Under the heading "Circumstances under which States can decline their responsibility", it listed two:

> "[T]he immediate necessity of self-defence against the danger with which the foreigner threatened the State or other persons" (Basis of Discussion No. 24);
>
> "[C]ircumstances justifying the exercise of reprisals against the State to which the foreigner belongs" (Basis of Discussion No. 25).[396]

The Preparatory Committee considered that the extent of a State's responsibility in the context of diplomatic protection could also be affected by the "provocative attitude" adopted by the injured person (Basis of Discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces "in the suppression of an insurrection, riot or other disturbance" (Basis of Discussion No. 21). However, these issues were not taken to any conclusion;

• *Proposals of García Amador*. In dealing with international responsibility for injuries to aliens, García Amador proposed the following cases under the heading "Exoneration from responsibility; Extenuating and aggravating circumstances":[397]

(1) *Force majeure*;

(2) State of necessity;

(3) Fault on the part of the alien.[398]

On the other hand, he excluded some particular "grounds or circumstances", either as falling outside the scope of his draft (self-defence) or as being "inadmissible" (reprisals, non-recognition of a State or Government and severance or suspension of diplomatic relations);[399]

• *ILC work on the law of treaties*. Fitzmaurice in his Fourth Report identified the following list of "circumstances justifying non-performance":[400]

(1) Acceptance of non-performance by the other party or parties;

(2) Impossibility of performance (*force majeure*);

(3) Legitimate military self-defence;

(4) Civil disturbances;

(5) Major emergencies arising from natural causes;

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[395] League of Nations publication, Sales No. V. Legal, 1929.V.3, p. 19. The Bases of Discussion are reproduced in annex II to the First Report on State responsibility by F. V. García Amador; see *Yearbook* ... 1956, vol. II, pp. 223–225.

[396] Ibid., pp. 224–225. Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

[397] *Yearbook* ... 1958, vol. II, p. 72. For the discussion of the circumstances by García Amador, see his First Report, *Yearbook* ... 1956, vol. II, pp. 203–209 and his Third Report, *Yearbook* ... 1958, vol. II, pp. 50–55.

[398] These three cases were included in article 13 (1)–(2) of the draft, article 13 (3) stating that "if not admissible as grounds for exoneration from responsibility, [they could] constitute extenuating circumstances in the determination of the quantum of reparation". In his First Report, García Amador had also addressed with approval the notion of extinctive prescription: see *Yearbook* ... 1956, vol. II, p. 209.

[399] *Yearbook* ... 1958, vol. II, pp. 53–55.

[400] Fitzmaurice, Fourth Report, *Yearbook* ... 1959, vol. II, pp. 44–47, and for his commentary, pp. 63–74.

(6) Previous non-performance by another party;[401]

(7) Non-performance by way of legitimate reprisals;

(8) Incompatibility with a new rule (in the nature of *jus cogens*).

Among this list, items (3) and (7) correspond to articles 34 and 30 of Chapter V; items (2), (4) and (5) are subsumed, more or less, in article 31 (*force majeure* and fortuitous event). Consent, distress and necessity (articles 29, 32 and 33) did not appear in Fitzmaurice's list, or at least were not separately identified. On the other hand, Chapter V does not deal with his items (1) (unless it be subsumed under consent), (6) or (8). The question whether they should do so is discussed in due course below.[402]

(c) Comments of Governments on Chapter V as a whole

216. France suggests that a single article enumerating the six circumstances precluding wrongfulness might be included in Chapter III.[403] But it also goes to point out the conceptual difference between some of those circumstances (consent, countermeasures and self-defence) and the others,[404] and this difference would be obscured by including all six circumstances in a single article.

217. The United Kingdom of Great Britain and Northern Ireland analyses at some length the nature of the "defences" provided for in Chapter V. Like France, it suggests that consent, countermeasures and self-defence are in a different legal category from the others, since they render the conduct covered entirely lawful, and accordingly exclude any question of compensation to the other State concerned. Necessity and distress, by contrast, relate to conduct which is not involuntary and "do not entirely preclude the wrongfulness of the conduct". Obligations of cessation (as soon as possible) and reparation for any injury caused should subsist in these cases.[405]

218. Japan supports maintaining Chapter V as an exhaustive list of the circumstances precluding wrongfulness: these need to be clearly defined and faithfully to reflect customary international law. It agrees with the idea of distinguishing between circumstances which mean that no issue of wrongfulness arises at all, from those which merely "preclude" wrongfulness, but would place *force majeure* and distress in the former category.[406]

219. Both the United Kingdom and the United States of America observe that a State may by treaty expressly or impliedly exclude one of the circumstances precluding wrongfulness as an excuse for conduct not in conformity with an obligation. This possibility could be met, according to the United States, by making article 37 (*lex specialis*) applicable to Part One as well as Part Two.[407]

220. In the light of these comments, it is proposed to discuss the general conception of "circumstances precluding wrongfulness", to deal in turn with articles 29 to 34, to consider whether any other justifications or excuses for wrongful conduct merit inclusion in

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[401] This is often referred to by reference to the Latin phrase "*exceptio inadimpleti contractus*" (more fully, "*exceptio inadimplenti non est adimplendum*"). Fitzmaurice tended to the view that it was an implied condition in all treaties, unless expressly excluded, rather than a separate principle of law: ibid., p. 70.

[402] See paras. 304–329.

[403] A/CN.4/488, p. 79.

[404] Ibid., pp. 80, 83.

[405] Ibid., p. 80.

[406] A/CN.4/492, p. 11.

[407] A/CN.4/488, p. 85.

Chapter V and finally to consider whether any specific procedural or other consequences should flow from the invocation of Chapter V.

2. The concept of "circumstances precluding wrongfulness"

221. The commentary stresses that the circumstances listed in Chapter V do not "at least in the normal case" preclude responsibility that would otherwise result from an act wrongful in itself. Rather they preclude the characterization of the act as wrongful in the first place.[408] Chapter V is said to derive its title as well as its basic idea from the fundamental distinction "between the idea of 'wrongfulness', indicating the fact that certain conduct by a State conflicts with an obligation imposed on that State by a 'primary' rule of international law, and the idea of 'responsibility', indicating the legal consequences which another ('secondary') rule of international law attaches to the act of the State constituted by such conduct".[409] The commentary concedes that, despite the general language of article 1, there could be circumstances precluding responsibility which did not preclude the wrongfulness of the act in question, but which preclude the State in question from being held responsible for it. But it denies that there would be any point in characterizing an act as wrongful without holding some State responsible.[410]

222. Consistently with this approach, the commentary goes on to explain that the six circumstances enumerated "have one essential feature in common: that of rendering definitively or temporarily inoperative the international obligation in respect of which a breach is alleged".[411] These are to be distinguished from attenuating or aggravating circumstances, which should be dealt with in Part Two of the draft articles.[412]

Some preliminary distinctions

223. The concept underlying Chapter V is to be distinguished from several other arguments which may have the effect of allowing a State to avoid a claim of responsibility but which do not "preclude wrongfulness" in the sense explained in the commentary. First, and most obviously, these circumstances have nothing to do with any question of the jurisdiction of a court or tribunal over a dispute, or the admissibility of a dispute.[413] Secondly, they are to be distinguished from the constituent requirements of the obligation, i.e., those elements which have to exist for the issue of wrongfulness to arise in the first place, and which are in principle specified by the obligation itself. In this sense "circumstances precluding wrongfulness" operate like general defences or excuses in national legal systems, and indeed many of the circumstances identified in Chapter V are similar to defences or excuses recognized by some or many legal systems (e.g., self-defence, necessity, *force majeure*).

224. A third distinction concerns the effect of circumstances precluding wrongfulness, as compared with the effect of the termination of the obligation itself. Here again it seems that the circumstances in Chapter V operate more as a shield than a sword. While they may

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[408] Commentary to Chapter V, para. (2).

[409] Ibid., para. (3).

[410] Ibid., para. (5).

[411] Ibid., para (9).

[412] Ibid., para. (10). In fact, there was no systematic consideration of attenuating or aggravating circumstances in Part Two, but see articles 42 (2) and 45 (2) (c), which deal incidentally with such circumstances.

[413] Conversely, a treaty exception for conduct necessary to preserve the essential security interests of a party operates as a specific conventional "circumstance precluding wrongfulness" so far as the treaty is concerned, and does not go to the jurisdiction of a court or tribunal: cf. *Case concerning Oil Platforms (Preliminary Objection), I.C.J. Reports 1996*, p. 803, at p. 811 (para. 20).

protect the State against an otherwise well-founded accusation of wrongful conduct, they do not strike down the obligation, and the underlying source of the obligation, the primary rule, is not affected by them *as such*. The distinction, which has not always been clearly perceived, was formulated by Fitzmaurice as follows:

> "[S]ome of the grounds justifying non-performance of a particular treaty obligation are identical with some of those causing or justifying the *termination* of a treaty. Yet ... the two subjects are quite distinct, if only because in the case of termination ... the treaty ends altogether, while in the other [case] ... it does not in general do so, and (if a paradox is permissible) the non-performance is not only justified, but 'looks towards' a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present ..."[414]

This emerges clearly from two major cases decided since Chapter V was first adopted, in both of which the distinction between non-performance and termination of an obligation was considered:

• Relevant aspects of the *Rainbow Warrior* arbitration have already been discussed.[415] The Tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while it was in force (including the question whether the wrongfulness of any apparent breach was precluded);[416]

• The International Court was even more incisive in the *Case concerning the Gabcikovo-Nagymaros Project*. In purporting to terminate the 1977 Treaty in May 1992, Hungary had relied, *inter alia*, on the state of necessity, which it had already invoked in 1989–1990 as a circumstance precluding the wrongfulness of its conduct in discontinuing work on the Project. The Court crisply rejected the argument:

> "[E]ven if a state of necessity is found to exist, it is not a ground for the termination of a Treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a Treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but — unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives."[417]

225. In the light of these distinctions, it is necessary to revert to the effect of Chapter V as described in the commentary, namely, that of "rendering definitively or temporarily inoperative the international obligation" in question.[418] The first point is that, while the same facts may amount, for example, to *force majeure* under article 31 and to a case of supervening impossibility of performance under article 61 of the Vienna Convention on the Law of Treaties, they are analytically distinct.[419] *Force majeure* justifies non-performance of the obligation for so long as the event exists; a case of supervening impossibility justifies the termination of the treaty (or its suspension). One operates in respect of the particular obligation; the other with respect to the treaty which is the source of that obligation. Thus the scope of application of the two doctrines is different. So too

[414] Fitzmaurice, Fourth Report, *Yearbook* ... 1959, vol. II, p. 41.

[415] See para. 109 above.

[416] UNRIAA, vol. XX (1990), at pp. 251–252 (para. 75).

[417] *I.C.J. Reports 1997*, p.7, at p. 63 (para. 101), see also p. 38 (para. 47).

[418] Commentary to Chapter V, para. (9).

[419] Ibid.

is their mode of application. A fortuitous event itself justifies non-performance, as it were by operation of law. By contrast, a treaty is not terminated by supervening impossibility: at least one of the parties must decide to terminate it. As to obligations arising under general international law, these normally cannot be "terminated" by the unilateral act of one State even in cases such as material breach by another State or fortuitous event.

226. Thus it is doubtful whether a circumstance precluding wrongfulness could ever render *definitively* inoperative any primary obligation. What it can do is to provide a justification for non-compliance which lasts as long as the conditions for relying on the given circumstance are met. If the primary obligation terminates, then so too does the need to rely on Chapter V. Similarly, if the act which would otherwise be a breach ceases, no further question of wrongfulness arises. Chapter V is only relevant for so long as the obligation, the conduct inconsistent with it and the circumstance precluding the wrongfulness of that conduct coexist. Rather than saying that a circumstance precluding wrongfulness renders the obligation "definitively or temporarily inoperative", it is clearer to distinguish between the existence of the primary obligation, which remains in force for the State concerned unless otherwise terminated,[420] and the existence of a circumstance precluding the wrongfulness of conduct not in conformity with that obligation. This also avoids the oddity of saying that conduct, the wrongfulness of which is precluded by, say, necessity, is "in conformity" with the primary obligation. The conduct does not conform, but if the circumstance precludes the wrongfulness of the conduct, neither is there a breach.[421] This was the approach taken by the Court to Chapter V of the draft articles in the *Case concerning the Gabcikovo-Nagymaros Project*. In dealing with the Hungarian plea of necessity it said:

> "The state of necessity claimed by Hungary — supposing it to have been established — thus could not permit of the conclusion that ... it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did."[422]

227. Of the six circumstances in Chapter V, the one which presents the greatest difficulty for this analysis is consent, since it is clear that consent could itself definitively render an obligation "inoperative" and bring it to an end. However, for reasons given below, the Special Rapporteur does not believe that consent belongs within the framework of Chapter V.[423]

Circumstances precluding wrongfulness or responsibility?

228. Thus Chapter V provides a shield against an otherwise well-founded claim for the breach of an obligation. But it is not clear that the different circumstances covered by Chapter V apply in the same way or to the same extent. It seems that some (for example, self-defence and consent) render the conduct in question lawful; in other words, they preclude wrongfulness. Action which meets the requirements for self-defence as referred to in Article 51 of the Charter of the United Nations is lawful as an exercise of an "inherent

[420] If it is a treaty obligation, it can only be terminated under the law of treaties. If it is a unilateral obligation, it can only be terminated under the law (whatever it may be) relating to the termination of unilateral obligations. If it is an obligation arising under general international law, it can only be terminated in accordance with the relevant rules of that law concerned with the termination of customary obligations. None of this is the province of the law of State responsibility.

[421] See paras. 10–14 above for a discussion of this issue in the context of article 16.

[422] *I.C.J. Reports 1997*, p. 7, at p. 39 (para. 48).

[423] See paras. 230–241 below.

right", as between the defending State and its aggressor.[424] The position with such circumstances as distress or necessity is less clear, as a number of Governments have pointed out.[425] It does not seem right to say that in a case of necessity or distress, the obligation in question is "inoperative". Not merely does the obligation subsist, but it continues to exercise an influence on the situation, such that the interest of the other State or States concerned must be taken into account in determining whether the circumstances really do amount to a state of necessity or to distress.

229. This suggests that at least two categories of circumstances are covered by Chapter V, a conclusion implicitly confirmed by article 35, which allows the possibility of compensation to an "injured" State in four of the cases covered by Chapter V but not in two others (self-defence and countermeasures). However, before considering whether the draft articles should make a more explicit distinction between justifications (such as self-defence), which preclude wrongfulness, and excuses (such as necessity), which may have some lesser effect, it is necessary to review the actual provisions of Chapter V.[426]

3. Review of specific articles

(a) Article 29: Consent

230. Article 29 provides as follows:

> "1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.
>
> "2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

231. The commentary asks whether the principle *volenti non fit injuria* applies in international law, and gives a qualified affirmative answer to that question. For the purposes of Chapter V, the question is not one of suspending, still less abrogating, the primary rule which gives rise to the obligation. Article 29 is concerned with the case where the other State (or other international legal person) concerned "consents not to general suspension of the rule ... but to non-application of the obligation provided for by the rule in a specific instance". Normally the rule will continue to apply in future; the obligation has simply been dispensed with in a given case.[427] But this can only be done by a valid consent, that is, by a consent which is not inconsistent with a peremptory norm. In addition, it may be that for some purposes the consent of a number of States is required, in which case the consent of State C does not preclude wrongfulness in relation to State B.[428] The examples given in the

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[424] This does not mean that *all* international obligations in force between the two States are rendered "inoperative" by legitimate self-defence. See paras. 296–299 below.

[425] See paras. 216–219 above.

[426] See para. 353 below.

[427] Commentary to article 29, para. (2).

[428] Ibid., para. (5), citing the issue of Austrian consent to the *Anschluss* of 1938, as dealt with by the International Military Tribunal at Nürmberg: United Kingdom, *Judgement of the International Military Tribunal for the Trial of German Major War Criminals*, Cmd. 6964 (London, Stationery Office, 1946), pp. 17 et seq., 13 ILR 199, at pp. 209–210. The Tribunal denied that Austrian consent had been given,

commentary mostly relate to the use of force on the territory of a State to suppress a coup, the stationing of troops abroad, humanitarian relief and rescue operations, or the arrest or detention of persons on foreign territory.[429] But the commentary also refers to the decision in the *Russian Indemnity* case, where the Permanent Court of Arbitration held that, by accepting repayments of principal alone over 20 years without protest or reservation of its rights, Russia had waived the payment of moratory interest.[430]

232. For consent to amount to a circumstance precluding wrongfulness, it must be "*valid in international law, clearly established, really expressed (which precludes merely presumed consent), internationally attributable to the State and anterior to the commission of the act to which it refers*".[431] Moreover, the conduct must fall within the limits of the consent given.[432] The commentary goes on to develop these requirements in some detail, relying heavily on the requirements for a valid consent under the law of treaties.[433]

Comments of Governments on article 29

233. As to paragraph 1, Austria queries the use of the qualifying phrase "in relation to that State", since consent may render conduct lawful generally.[434] France doubts the value of the term "validly given", with its overtones of the law of treaties.[435] The United Kingdom denies that consent can validly be given by all those persons whose conduct is attributable to the State under Chapter II, despite a statement in the commentary apparently to that effect.[436] For example, consent by an insurrectional movement would not bind the State for the purposes of article 29, even if the conduct of that movement might be attributable to the State under article 15. Secondly, in its view, the Commission should consider the question of implied or retrospective consent, especially where humanitarian action is taken in an emergency.[437]

234. As to paragraph 2, Austria asks whether the issue of peremptory norms (*jus cogens*) needs to be raised,[438] a question which France answers firmly in the negative.[439] The United Kingdom agrees with France, pointing to the uncertainties surrounding peremptory norms.[440]

The place of consent in Chapter V

235. Most of the comments of Governments on article 29 relate to the formulation of the principle of consent, rather than the principle itself. The comments raise substantial concerns, e.g., about the scope of the word "validly" in paragraph 1 or about the reference to peremptory norms in paragraph 2. But it is not only in those respects that article 29 raises more issues than it resolves. All the other circumstances dealt with in Chapter V are defined,

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and noted that the *Anschluss* was in any event illegal in the absence of the consent of the parties to the Peace Treaties of 1919.

[429] Commentary to article 29, paras. (6)–(9), citing on the question of arrest on foreign territory the decision of the Permanent Court of Arbitration in the *Savarkar* case. UNRIAA, vol. XI, pp. 252–255 (1911).

[430] UNRIAA, vol. XI, p. 421, at p. 446 (1912).

[431] Commentary to article 29, para. (11) (emphasis in original).

[432] Ibid.

[433] Ibid., para. (12).

[434] A/CN.4/488, p.81.

[435] Ibid.

[436] Ibid., pp. 81–82, citing commentary to article 29, para. (15).

[437] Ibid., p. 82.

[438] Ibid.

[439] Ibid., pp. 82–83.

[440] Ibid., p. 82.

either by the articles themselves (*force majeure*, distress, state of necessity) or elsewhere in the draft articles (countermeasures), or at least by reasonably well-understood and well-developed rules of general international law reflected in the Charter of the United Nations (self-defence). Only consent as a circumstance precluding wrongfulness is left to the uncertainties of phrases such as "validly". Moreover, as France and the United Kingdom both point out, analogies with other areas of international law (attribution, the law of treaties) provide uncertain guidance as to whether a particular official had authority to "preclude the wrongfulness" of conduct by consenting to it. In the *Savarkar* case,[441] for example, it was irrelevant that the *brigadier* who agreed to return the escapee to the British ship had no authority to enter into international agreements on behalf of France. Of course, his conduct would have been attributable to France under Chapter II of Part One, but again that was not the point. Rather, the question was whether his consent to the return of the escapee was sufficient. On this question article 29 provides no guidance. The commentary goes further, but some of its clarifications are not spelled out in the article itself and, more importantly, it says little or nothing as to the actual or ostensible authority to consent for the purposes of Chapter V. It may well be that the question as to who has authority to consent to a departure from a particular rule depends, to some extent at least, on the particular rule. It is one thing to consent to a search of embassy premises, another to the trial of an extraditee on a charge other than that on which the person was extradited and yet another to the establishment of a military base on the territory of a State, or to the conduct of military operations against rebels located on that territory.

236. This suggests that there is a deeper problem with article 29 than one simply of formulation. Is it possible to distinguish between, on the one hand, the issue of consent as an element in the application of a rule (which is accordingly part of the *definition* of the relevant obligation) and, on the other hand, the issue of consent as a basis for precluding the wrongfulness of conduct inconsistent with the obligation? The commentary unequivocally excludes cases of consent given *after* the conduct has occurred, which it rightly regards as a form of waiver.[442] But if consent must be given in advance, and if it is only validly given in some cases and not in others, and if authority to consent varies with the rule in question, then it may be asked whether the element of consent should not be seen as incorporated in the different primary rules, possibly in different terms for different rules. For example, the rule that a State has the exclusive right to exercise jurisdiction or authority on its territory is subject to the proviso that foreign jurisdiction may be exercised with the consent of the host State, and such cases are very common (e.g., commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, etc.). They do not involve, even prima facie, conduct not in conformity with the international obligation, and thus they fall outside the scope of Chapter V, and indeed outside the scope of the draft articles as a whole. Fitzmaurice referred to such cases under the rubric of "Non-performance justified *ab intra* by virtue of a condition of a treaty implied in it by international law", and he formulated the distinction as follows:

> "Since the very issue, whether non-performance is justified, is one that assumes the existence of a prima facie or apparent obligation under the treaty, conditions expressed in or implied by the language of the treaty itself relate to the existence and scope of the obligation, not to the justification for its non-performance."[443]

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[441] UNRIAA, vol. XI, p. 252 (1911).

[442] Commentary to article 29, para. (16). In this respect it is odd that the commentary refers to the *Russian Indemnity* case, which was probably a case of waiver and certainly did not involve consent in advance.

[443] Fitzmaurice, Fourth Report, *Yearbook* ... 1959 vol. II, at p. 46.

He was of course dealing only with the law of treaties, but the same principle surely applies to the formulation of obligations arising under general international law (e.g., the obligation not to exercise civil jurisdiction on the territory of another State without its consent, or not to overfly its territory without prior authorization). This explains why Fitzmaurice did not deal with consent as a separate "circumstance justifying non-performance". Instead he dealt with it under the rubric of "acceptance of non-performance", which is best considered as a form of waiver. It does not concern the question whether responsibility has arisen in the first place, but rather the loss of the right to invoke responsibility, which is outside the scope of Part One.[444]

237. The distinction between "intrinsic" and "extrinsic" justifications or excuses raises a further doubt. All the other articles in Chapter V relate to circumstances (*force majeure*, distress, necessity, an armed attack or other unlawful conduct giving a right to respond by way of self-defence or countermeasures) which were present at the time of the wrongful act. The commentary limits article 29 to consent given in advance, yet such consent validly given implies that the conduct is perfectly lawful at the time it occurs. By contrast, where a State acts inconsistently with an obligation and its conduct is excused on grounds such as necessity, *force majeure* or distress, one is not inclined to say that the conduct is "perfectly lawful". Rather there is an apparent or prima facie breach which is or may be excused. Even in the case of self-defence or countermeasures, where the conduct may be intrinsically lawful in the circumstances, at least there is a situation which requires some explanation and some justification.[445]

238. Is it possible to envisage cases where an obligation is properly formulated in absolute terms (i.e., without any condition or qualification relating to consent), but nonetheless the consent of the State concerned precludes the wrongfulness of the conduct? If so, article 29 might have a valid, though limited, scope of application. The Special Rapporteur is not aware of any such case.[446] All the examples given in the commentary relate to rules (non-exercise of foreign jurisdiction on the territory of a State; non-use of force against it; non-intervention in its internal affairs, etc.) which are not absolute prohibitions but which allow that the conduct in question may be validly consented to by the target State. In the absence of identifiable intermediate cases (i.e., cases where consent might validly be given in advance but where it is not part of the definition of the obligation) the position appears to be as follows: Either the obligation in question allows that consent may be given in advance to conduct which, in the absence of such consent, would conflict with the obligation, or it does not. In the former case, and consent is validly given, the issue whether wrongfulness is precluded does not arise. In the latter, consent cannot be given at all. Both cases are distinguishable from waiver after a breach has occurred, giving rise to State responsibility.[447]

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[444] See para. 350 below.

[445] A State exercising a right to self-defence is required to notify the Security Council "immediately": Charter of the United Nations, Article 51. The conditions on the proper exercise of countermeasures are currently contained in articles 47 to 50 and also imply a measure of international scrutiny.

[446] One possibility, which approximates to Fitzmaurice's idea of "acceptance of non-performance" might be provided by the following example: Assume State A acts with respect to State B in breach of a bilateral obligation, anticipating that State B would consent if asked, and State B, aware of State A's conduct, does not object. But such cases do not fall within the scope of article 29 as explained in the commentary, and even if they can be envisaged they would not call for separate treatment in Chapter V. It seems better to deal with them under the rubric of waiver or perhaps estoppel.

[447] The distinction between consent *ex ante* and waiver can be seen from the following examples: First, the State organ with authority to waive a breach, once State responsibility which has actually arisen, may be different from the State organ which had authority to consent in advance. Secondly, in the case of an *erga omnes* obligation (e.g., pursuant to Article 2 (4) of the Charter), it may nonetheless be true that one particular State was competent to consent in advance to conduct which would otherwise have been a

239. For all these reasons, it seems that to treat consent in advance as a circumstance precluding wrongfulness is to confuse the content of the substantive obligation with the operation of the secondary rules of responsibility, whereas to treat consent given in arrears as such a circumstance is to confuse the origins of responsibility with its implementation (*mise en oeuvre*). In neither case is article 29 properly located in Chapter V, and it should be deleted. Instead, an explanation of the role of consent in relation to State responsibility should be inserted in the commentary to Chapter V.

240. However, in case this recommendation is not accepted, it is appropriate to say something on the specific issues raised by Governments as to the formulation of article 29.

(a) "*Consent validly given*". Some of the difficulties raised by this phrase have been outlined above. It is clear that some such qualification is required, since it is not the case that one State can release another from every obligation (e.g., in relation to human rights). But there is no simple or non-circular test for determining in what circumstances or to what extent a dispensation from one State precludes the wrongfulness of the conduct of another.[448] Moreover, the phrase "validly given" performs not one function but two: it points to the existence of cases in which consent may not be validly given at all, and it also suggests (but without specifying) that certain modalities need to be observed in giving consent and that issues of the authority to consent may arise. Neither aspect could be developed further without going deeply into the content of the primary rules, although some of the procedural prerequisites to a valid consent, spelled out in the commentary, could be included in the text;

(b) *Consent and peremptory norms*. Again, despite the uncertainties as to the scope and content of peremptory norms which have been referred to by some Governments, it is clear that one State cannot by ad hoc consent dispense another from the obligation to comply with a peremptory norm, e.g., in relation to genocide or torture, any more than it could do so in a treaty. It might be argued at least that one State could absolve another from responsibility for such a breach so far as that State was concerned. But, first of all, article 29 is concerned with circumstances precluding wrongfulness, not responsibility. Secondly, there are many cases in which State consent *does* preclude wrongfulness. Thirdly, as to consent given in advance (which is all that article 29 purports to cover), the demands of a peremptory norm are hardly satisfied by maintaining in place the formal obligation while absolving the wrongdoing State from any responsibility for its breach. Agreement to dispense with responsibility for genocide or torture seems just as inconsistent with the peremptory character of the relevant norm as would be consent to dispense with the underlying obligation. But the difficulties go further. Some peremptory norms contain an "intrinsic" consent element. For example, the rule relating to the non-use of force in international relations embodied in Article 2, paragraph 4, of the Charter of the United Nations does not apply in certain cases where one State has consented to the use of force on its territory by another State. But one State cannot by consent *eliminate* the rule relating

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breach of the obligation (cf. the comment by Austria, above, para. 233). It does not follow, however, that only that State has a legal interest in the breach after it has occurred.

[448] This is true even of the simplest qualifying phrase "in the relations between those States", since what constitutes a merely "bilateral" obligation and what goes beyond the purely bilateral depends on the content and purpose of the obligation. Thus one State may be the primary beneficiary of an obligation imposed in the general interest (e.g., as to the neutrality of that State), and it may not be able alone to release another State from compliance with the obligation. For example, in the debate over whether Austrian membership of the EEC was consistent with its neutrality it was never argued that Austria's consent to membership precluded wrongfulness. See, e.g., I. Seidl-Hohenveldern, "Österreich und die EWG" (1968) 14 *Jahrbuch für internationales Recht* 128; D. Kennedy and L. Specht, "Austrian Membership in the European Communities" (1990) 31 *Harvard ILJ* 407.

to the use of force in international relations in its relations with another State.[449] Thus it may be necessary to distinguish between a consent which applies Article 2 (4), which may be valid, and a purported consent which displaces or excludes it entirely, which, if Article 2 (4) is peremptory in character, would be invalid;

(c) *Consent of persons other than States*. Draft article 29 envisages only the consent of States and perhaps other international legal persons,[450] but there are international law rules which take into account the consent, for example, of corporations or private persons. The extent to which investors can waive the rules of diplomatic protection by agreement in advance has long been controversial, but under the ICSID Convention of 1965, consent by an investor to arbitration under the Convention suspends the right of diplomatic protection by the investor's national State.[451] In the field of human rights, it is not the case that the individual can waive the rights conferred by international treaties, but the individual's free consent is relevant to the application of at least some of those rights;[452]

(d) *The limits of consent*. As the commentary notes, if wrongfulness is precluded by virtue of the consent of a State, it may only be precluded within the limits of such consent.[453] But again there may be difficulties in the application of this idea. For example, consent to a visiting force on the territory of a State may be qualified (e.g., by a requirement to pay rental for the use of facilities) but the non-payment of the rental, while it would no doubt be wrongful in itself and might have further legal consequences, would not automatically transform the visiting force into an army of occupation.

Conclusions on article 29

241 No doubt some of these questions can be addressed in the drafting of article 29, while others are a matter of its application in specific cases. But a more detailed examination of the wording of article 29 confirms the conclusion that it is not properly located in Chapter V. To summarize, lack of consent is an intrinsic condition for wrongfulness in the case of many obligations (e.g., the obligation not to overfly the territory of another State). In such cases, to regard consent as a circumstance precluding unlawfulness is very odd since consent validly given in advance renders the conduct lawful, and there is nothing to be precluded. One might as well say that refraining from overflight is a circumstance precluding wrongfulness. Such a construction would eliminate the distinction between primary and secondary obligations. Consent given after the event is quite different, and involves the waiver of a responsibility which has already arisen: it should be dealt with under the rubric of loss of the right to invoke responsibility in Part Two or perhaps Part Three of the draft articles. For these reasons, article 29 should be deleted, and its deletion carefully explained in the commentary to Chapter V, to avoid misunderstandings.

[449] On the extent to which "invasion pacts" and "intervention by invitation" may be lawful, see, e.g., B. R. Roth, *Governmental Illegitimacy in International Law* (Oxford, Clarendon Press, 1999), pp. 185–195.

[450] Commentary to article 29, paras. (2) and (15).

[451] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 1965, article 27 (1).

[452] See, e.g., International Covenant on Civil and Political Rights, 1966, articles 7, second sentence; 8 (3) (c) (iv); 14 (1) (g); 23 (3).

[453] Commentary to article 29, para. (17).

(b) Article 30: Countermeasures in respect of an internationally wrongful act

242. Article 30 provides as follows:

> "The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State."

243. Article 30 needs to be read in the context of the articles in Part Two, which specify in some detail the extent and consequences of permissible countermeasures. In other words, the content of the phrase "legitimate under international law" in article 30 is now spelled out in some detail elsewhere in the text.

244. The commentary to article 30 emphasizes the exceptional role of countermeasures in rendering "inoperative" an obligation towards a State subjected to countermeasures.[454] Countermeasures must be taken in response to unlawful conduct by the target State, either "to inflict punishment or to secure performance", but subject to the limits laid down by international law.[455] The ensuing discussion of those limits is not fully consistent with the provisions in Part Two: for example, the commentary to article 29 seems to envisage that the use of military force might sometimes be lawful as a countermeasure,[456] which article 50 (a) expressly denies. This emphasizes the need to consider article 30 and Chapter III of Part Two together.

245. According to the commentary, countermeasures are no longer limited to breaches of bilateral obligations, or to responses taken by the State most directly injured. A breach of obligations *erga omnes* "is to be deemed an offence against all the members of the international community and not simply against the State or States directly affected by the breach".[457] Such a breach may thus be collectively sanctioned. Whether it involves obligations *erga omnes* or not, "the prior existence of the internationally wrongful act of the State which is the subject of the measure precludes the wrongfulness of the legitimate reaction against it",[458] so far as the wrongdoing State is concerned.[459]

Comments of Governments on article 30

246. France raises a number of drafting difficulties, and also calls attention to the need to distinguish individual countermeasures from collective enforcement action under the auspices of the United Nations. Article 30 should be limited to the former.[460] The United Kingdom and the United States suggest that article 30 can stand alone, without what they regard as the questionable provisions on countermeasures in Part Two, in the same way that the right of self-defence is referred to without its content being described in detail.[461] Japan and France, on the other hand, suggest that article 30 be specifically tied to the provisions on countermeasures in Part Two.[462]

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[454] Commentary to article 30, para. (2).

[455] Ibid., para. (3).

[456] Commentary to article 29, para. (5), but see paras. (10)–(11).

[457] Commentary to article 30, para. (12).

[458] Ibid., para. (16).

[459] But not, the commentary stresses, so far as concerns the rights of third States: ibid., paras. (17)–(19), (24), citing the *Cysne* case, UNRIAA, vol. II, p. 1035, at p. 1056 (1930). See current article 47 (3).

[460] A/CN.4/488, p. 83. Japan agrees: A/CN.4/492, pp. 11–12.

[461] A/CN.4/488, pp. 83–84.

[462] Ibid., pp. 82–83 (France); A/CN.4/492, p. 12 (Japan).

247. By contrast, Mexico questions the inclusion of article 30 at all, and in any event calls for better provisions for settlement of disputes in cases involving countermeasures.[463]

The treatment of countermeasures in the draft articles as a whole

248. A number of Governments have raised issues about the treatment of countermeasures in Part Two of the draft articles (articles 47–50), doubting the wisdom of retaining those articles and the practicality of the dispute settlement provisions. Apart from questions of drafting and expression, the doubts come from different directions, both from States which support the principle of countermeasures and from those which oppose it. This divergence of view presents a difficulty so far as article 30 is concerned. On the one hand, it is clear that, in at least some cases, countermeasures do preclude the wrongfulness of conduct taken against a wrongdoing State in order to induce it to cease its wrongful conduct and to provide essential elements of restitution. On this basis there is a strong case for the retention of article 30 in some form in Chapter V. On the other hand, the extent to which the requirements for legitimate countermeasures should be spelled out in article 30 must depend on whether the articles on countermeasures in Part Two are retained. If they are retained, a simple cross-reference to those conditions will be sufficient (as noted by Japan and France). If they are deleted, the position will be different and the case for some further specification of the circumstances for legitimate countermeasures in article 30 will be much stronger. It is true that Chapter V does not specify in any detail the conditions for invoking consent, or self-defence. But the failure to do so in relation to consent has already been criticized, while the position of self-defence is different, *inter alia*, because the inherent right to self-defence is expressly preserved in the Charter, and cannot be affected by anything contained in the draft articles.

249. For these reasons the Special Rapporteur proposes that article 30 be retained in square brackets, in recognition that countermeasures may, in some cases, preclude the wrongfulness of (or at least responsibility for) the conduct in question, but that the various issues of principle and of drafting be deferred for consideration in the context of the provisions on countermeasures in Part Two.

(c) Article 31: *Force majeure* and fortuitous event

250. Article 31 provides as follows:

> "1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.
>
> "2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility."

251. The commentary to article 31 begins by noting that *force majeure* and fortuitous event have in common "the irrelevance of the prior conduct of the State against which" they are invoked.[464] They are involuntary both so far as the "active" and the "passive" State is concerned.[465] Because there is no clear distinction between the two situations, they are included in a single article. Both cover cases of "material impossibility", and it does not

[463] A/CN.4/488, p. 83.

[464] Commentary to article 31, para. (2).

[465] Ibid., para. (4).

matter whether this impossibility is due to natural or human intervention, or a combination of the two, so long as it is outside the control of the acting State.[466] In drafting what became article 61 of the Vienna Convention on the Law of Treaties on supervening impossibility of performance, the Commission had taken the view that *force majeure* was also a circumstance precluding wrongfulness in relation to treaty performance.[467] The same view was taken at the Vienna Conference, although the Conference insisted on a narrow formulation of article 61 so far as treaty termination was concerned.[468]

252. In State practice, most of the cases where "impossibility" has been relied on did not involve actual impossibility as distinct from increased difficulty of performance, and the plea of *force majeure* accordingly failed. But cases of material impossibility have occurred, e.g., where "a State aircraft ... because of damage, loss of control of the aircraft or a storm, is forced into the airspace of another State without the latter's authorization, either because the pilot's efforts to prevent this happening have been unsuccessful or because he could not know what was happening", and in such cases the principle that wrongfulness is precluded has been accepted.[469]

253. Apart from aerial incidents, the principle in article 30 is also recognized in relation to ships in innocent passage by article 14 (3) of the 1958 Convention on the Territorial Sea and the Contiguous Zone (now article 18 (2) of the 1982 United Nations Convention on the Law of the Sea), as well as in article 7 (1) of the Convention on Transit Trade of Land-locked States of 8 July 1965. "In these provisions, *force majeure* is admittedly a constituent element of the 'primary rules' laid down therein, but the very fact that it has been incorporated in these rules is clearly an express confirmation, in relation to particular cases, of a general principle of customary international law whereby *force majeure* has the effect of precluding wrongfulness."[470] The principle was also accepted by the Permanent Court of Arbitration. In the *Ottoman Empire Lighthouse* case, a lighthouse owned by a French company had been requisitioned by the Greek Government in 1915 and was subsequently destroyed by enemy action. The Court denied the French claim for restoration of the lighthouse on grounds of *force majeure*.[471] In the *Russian Indemnity* case, the principle was accepted, but the plea of *force majeure* failed on the facts because the payment of the debt was not materially impossible.[472] *Force majeure* was acknowledged as a general principle of law (though again the plea was rejected on the facts of the case) by the Permanent Court of International Justice in the *Serbian Loans* and *Brazilian Loans* cases.[473]

254. After a thorough review of practice, case law and doctrine, the commentary concludes by affirming the principle, but it stresses that it only applies where the impossibility was irresistible and was objectively unforeseen, so that the State concerned had "no real possibility of escaping the effects of such a force or event". Moreover, the State "*must not*

[466] Ibid., para. (7).

[467] Ibid., para. (9), citing *Yearbook* ... 1966, vol. II, p. 255.

[468] Commentary to article 31, para. (10).

[469] Ibid., para. (12), citing cases of accidental intrusion into airspace attributable to weather, and also cases of accidental bombing of neutral territory attributable to navigational errors during the First World War.

[470] Commentary to article 31, para. (16).

[471] Ibid., para. (21), citing UNRIAA, vol. XII (1956), at pp. 219–220. Many other cases of *force majeure* were catalogued in a Secretariat Survey, "'Force majeure' and 'fortuitous event' as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine", *Yearbook* ... 1978, vol. II, Part One, pp. 61–227.

[472] Commentary to article 31, para. (21), citing UNRIAA, vol. XI (1912), at p. 443.

[473] Commentary to article 31, paras. (23)–(24), citing *P.C.I.J. Series A*, No. 20 (1929), at pp. 33–40; ibid., No. 21 (1929), at p. 120.

itself have contributed, intentionally or through negligence, to the occurrence of the situation of material impossibility".[474]

Comments of Governments on article 31

255. Austria expresses the view that article 31 blurs objective and subjective elements in a confusing way, and suggests that the notion of "material impossibility" should be developed in preference to "fortuitous event".[475] The United Kingdom accepts the principle stated in article 31 but also calls for it to be limited to exceptional cases of material impossibility which are beyond the control of the State concerned.[476] France suggests that the two phrases "*force majeure*" and "fortuitous event" relate to the same regime; the article should be revised to eliminate redundancy.[477] None of these comments questions the need for article 31 in some form.

The application of article 31 in recent practice

256. In the *Rainbow Warrior* arbitration, France relied on *force majeure* as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical treatment. The Tribunal dealt with the point briefly:

> "New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*."[478]

Thus the decision adds to the many cited in the commentary and in the Secretariat Survey which accept the principle that wrongfulness is precluded in international law, as well as in many systems of national law, by *force majeure*, while at the same time attaching stringent conditions to its application.

257. There is of course a distinction between *force majeure* as a circumstance precluding wrongfulness and impossibility of performance as a ground for termination of a treaty. *Force majeure* applies both to treaty and to non-treaty obligations, and it applies by operation of law on the happening of a situation of *force majeure*. Impossibility of performance, like other grounds for the termination of a treaty, has to be formally invoked by a party, and it applies only after it has been duly invoked. In addition, the "degree of difficulty" associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 of the Vienna Convention on the Law of Treaties for termination on grounds of supervening impossibility, as the International Court pointed out in the *Case concerning the Gabcikovo-Nagymaros Project*:

> "Article 61, paragraph 1, requires the 'permanent disappearance or destruction of an object indispensable for the execution' of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties ... Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating

[474] Commentary to article 31, para. (36) (emphasis in original).

[475] A/CN.4/488, p. 85.

[476] Ibid., p. 86.

[477] Ibid. In addition it suggests that paragraph (2) is redundant and can be omitted.

[478] UNRIAA, vol. XX, p. 217 (1990), at p. 253.

States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept."[479]

258. In addition to its application in inter-State cases as a matter of public international law, *force majeure* has substantial currency in the field of international trade and mixed arbitration, and probably qualifies as a general principle of law.[480]

(a) Chapter V of the UNCITRAL Convention on the International Sale of Goods (the Vienna Sales Convention of 1980) deals with "Provisions common to the obligations of the seller and of the buyer". Section IV is entitled "Exemptions", and contains only two provisions, article 79 dealing with unavoidable impediments and article 80 dealing with the *exceptio inadimpleti contractus*. Article 79 does not use the term "*force majeure*" but it covers the same field. A party is not liable for a failure to perform if he proves that the failure was due to ...

"an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences".[481]

(b) In the UNIDROIT Principles of International Commercial Contracts, article 7.1.7 deals with *force majeure*, which is defined in essentially the same terms as in the 1980 Convention.[482]

259. For all these reasons, article 31 should be retained in the draft articles. There are, however, certain questions of formulation.

Force majeure *and the "knowledge" of wrongfulness*

260. One of the curious features of article 31 is the phrase "made it materially impossible ... to know that its conduct was not in conformity with that obligation".[483] This suggests that State responsibility depends on the State "knowing" that its conduct is wrongful, yet in general such knowledge is not required. Ignorance of a State's legal obligations is no excuse

[479] *I.C.J. Reports 1997*, p. 7, at p. 63 (para. 102).

[480] *Force majeure* is not a defence to breach of contract under English common law, because of the presumption that contractual undertakings are warranties. There is a narrower conception of "act of God" which is a defence in tort. However, common-law courts have become very used to the notion of *force majeure* because of the frequent insertion of *force majeure* clauses in contract, especially in international trade. See generally E. McKendrick, *Force Majeure and Frustration of Contract* (1995).

[481] See P. Schlechtriem and G. Thomas, *Commentary on the United Nations Convention on the International Sale of Goods* (Oxford, Clarendon Press, 1998), 2nd ed., pp. 600–626. For comparative law materials on *force majeure*, see, e.g., U. Draetta, "Force Majeure Clauses in International Trade Practice" (1996) 5 *International Business Law Journal* 547; K. D. Magliveras, "Force Majeure in Community Law", (1990) 15 *European Law Review* 460; P. van Ommeslaghe, "Les clauses de force majeure et d'imprévision (*Hardship*) dans les contrats internationaux", (1980) 57 *Revue de droit international et de droit comparé* 15. On *force majeure* in the case law of the Iran-United States Tribunal, see G. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996), pp. 306–320. *Force majeure* has also been recognized as a general principle of law by the European Court of Justice: see, e.g., Case 145/85, *Denkavit Belgie NV v Belgium* [1987] ECR 565. See further C. Stefanou and H. Xanthaki, *A Legal and Political Interpretation of Articles 224 and 225 of the Treaty of Rome* (Ashgate, Aldershot, 1997), pp. 78–80.

[482] See UNIDROIT, *Principles of International Commercial Contracts* (Rome, 1994), pp. 169–171, for text and commentary.

[483] See Austria's comment on article 31, para. 255 above.

for breaching them, nor is mistake of law.[484] It is true that there might be an innocent mistake of fact (e.g., as to the location of an aircraft, owing to an undetected fault in navigational equipment), and this might qualify as a circumstance precluding wrongfulness. Article 31 can however be formulated without the introduction of overtly subjective elements: it should only apply in cases where an unforeseen external event deprived a State from having knowledge of a fact which was an essential element of its responsibility *in the circumstances*, and without which the conduct in question would not have been wrongful. On this basis the reference in article 31 to knowledge of wrongfulness can be deleted.[485]

Exclusion of force majeure: *(a) if the State has "contributed" to the* force majeure *situation*

261. By definition, a situation which has been caused or induced by the invoking State is not one of *force majeure*; the circumstance must be genuinely involuntary in order to qualify. Thus in *Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi*, the Arbitral Tribunal rejected a plea of *force majeure* because "the alleged impossibility was not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact the impossibility is the result of a unilateral decision of that State ..."[486] However article 31 as adopted on first reading goes beyond this and excludes *force majeure* "if the State in question has contributed to the occurrence of the situation of material impossibility".[487] By contrast, under the otherwise more restrictive ground for termination of a treaty in article 61 of the Vienna Convention on the Law of Treaties, material impossibility cannot be invoked "if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty". This seems a more appropriate test, since it may well be that a State has unwittingly "contributed" to a *force majeure* situation by something which, in hindsight, might have been done differently but which did not itself constitute a breach of an international obligation or make the event any less unforeseen. Provided the ensuing situation of *force majeure* is genuine, there is no reason to exclude it as a circumstance precluding wrongfulness. Accordingly, article 31 should provide that *force majeure* is only excluded if the State has produced or contributed to producing the situation through its own wrongful conduct.

Exclusion of force majeure: *(b) voluntary assumption of risk*

262. Secondly, *force majeure* should not excuse non-performance if the State has undertaken to prevent the particular situation arising, or has otherwise assumed that risk, and article 31 should so provide.[488] It might be argued that for *force majeure* to be excluded, an express undertaking by the State concerned should be required, but obligations can be formulated and undertaken in a variety of ways, and in the context of Chapter V it should be sufficient that the assumption of risk is clear.

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[484] In some legal systems, a claim of right, held in good faith, may justify or excuse certain conduct, even though the legal basis of the claim is incorrect. There does not appear to be any authority for such a doctrine in international law.

[485] For the proposed formulation, see para. 356 below.

[486] *Revue belge de droit international*, 1990, p. 517; (1994) 96 ILR 279, at pp. 317–318.

[487] The commentary suggests that a narrower basis for exclusion was intended: see para. 254 above.

[488] As the Secretariat Survey (see note 471 above) points out (para. 31), States may renounce the right to rely on *force majeure* by agreement. The most common way of doing so would be by an agreement or obligation assuming in advance the risk of the particular *force majeure* event.

Conclusions on article 31

263. For these reasons, article 31 should be retained with the changes indicated above. In addition, as France points out,[489] it seems sufficient to refer to the circumstance by the internationally well-known and accepted title of "*force majeure*", and that term should be included in the article itself as well as constituting its title. The title "*Force majeure* and fortuitous event" derives from the French Civil Code, but by no means all cases of "fortuitous event" (*cas fortuit*) qualify as excuses in international law,[490] whereas cases of *force majeure* as defined in article 31 seem adequate to cover the field.[491]

(d) Article 32: Distress

264. Article 32 provides as follows:

> "1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.
>
> "2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril."

265. The commentary to article 32 notes that it deals with the specific case where an individual person whose acts are attributable to the State is in a situation of extreme peril, either personally or in relation to persons under his or her care.[492] Unlike situations of *force majeure*, a person acting under distress is not acting involuntarily, even though the choice is effectively "nullified by the situation of extreme peril".[493] Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterizes situations of necessity under article 33.[494] The interest concerned is the immediate one of saving people's lives, irrespective of their nationality.

266. In practice, cases of distress have mostly involved ships or aircraft entering State territory under stress of weather or following mechanical or navigational failure.[495] But distress should not be limited to ships and aircraft,[496] especially if it is limited to cases involving a threat to life itself.[497] Moreover, distress can only preclude wrongfulness where the interests sought to be protected (e.g., the lives of passengers and crew) clearly outweigh

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[489] See para. 255 above.

[490] The Secretariat Survey (paras. 17–19) reviews the debate among the civil lawyers as to whether and how *force majeure* and fortuitous event are to be distinguished, but notes (para. 19) that "in international law practice and doctrine the term '*force majeure*' is normally used *lato sensu*, namely, covering *force majeure* (*stricto sensu*) as well as 'fortuitous event'."

[491] Fort the text of article 31 as proposed, see para. 356 below.

[492] Commentary to article 32, para. (1).

[493] Ibid., para. (2).

[494] Ibid., para. (3).

[495] Ibid., para. (5), reviewing some of the incidents. See also Secretariat Survey, paras. 141–142 and 252. An analogous right for private ships has always been recognized, although it falls outside Chapter V since the conduct of private persons is not as such attributable to the State: see Secretariat Survey, paras. 328–331; Geneva Convention on the Territorial Sea and Contiguous Zone, 1958, Art. 14 (3), cited in the commentary to article 32, para. (7).

[496] Commentary to article 32, para. (9).

[497] Ibid., para. (10).

the other interests at stake in the circumstances. Thus if the conduct sought to be excused endangers more lives than it may save, it is not covered by the plea of distress.[498]

Comments of Governments on article 32

267. France proposes tighter wording to prevent abuse of the defence of "distress".[499] Mongolia goes further, doubting the desirability of distress as a circumstance precluding wrongfulness at all.[500] On the other hand, the United Kingdom is critical of the limitation of article 32 to persons in the care of the State concerned, and calls for the draft articles explicitly to recognize emergency humanitarian action.[501] Japan too supports a broader formulation, covering threats not only to life but also to other vital interests of persons, including economic interests.[502]

International practice as to the plea of distress since 1980

268. The validity of the plea of distress has continued to be accepted in practice since the adoption of article 32 on first reading. In the conventional context of distress at sea, the exception for distress contained in article 14 (3) of the first Geneva Convention of 1958 is repeated in much the same terms in article 18 (2) of the 1982 Convention on the Law of the Sea.[503] More significant for present purposes was the discussion of the issue in the *Rainbow Warrior* case, since it involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft.

269. The facts of the case have already been referred to.[504] France sought to justify its conduct in removing the two officers from the island of Hao on the ground of "circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State".[505] The Tribunal unanimously accepted that this plea was admissible in principle, and by majority that it was applicable to the facts of one of the two cases. As to the principle, the Tribunal required France to show three things:

> "(1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated;
>
> "(2) The re-establishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared;
>
> "(3) The existence of a good-faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement."[506]

In fact the danger to one of the officers (Mafart), though perhaps not life-threatening, was real and might have been imminent, and it was not denied by the New Zealand physician who subsequently examined him. By contrast, in the case of the second officer (Prieur), the

[498] Ibid., para. (11).
[499] A/CN.4/488, pp. 86–87.
[500] Ibid., p. 86.
[501] Ibid., pp. 86–87.
[502] A/CN.4/492, p. 12.
[503] See also United Nations Convention on the Law of the Sea, articles 39 (1) (c), 98 and 109.
[504] See para. 256 above.
[505] UNRIAA, vol. XX, p. 217 (1990) at pp. 254–255 (para. 78).
[506] Ibid., p. 255 (para. 79).

justifications given (the need for medical examination on grounds of pregnancy and the desire to see a dying father) did not justify emergency action. The lives of the agent and the child were at no stage threatened and there were excellent medical facilities nearby. The Tribunal held that:

> "[C]learly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations ..."[507]

270. Given the generally favourable response to article 32 and the acceptance of the principle by the Tribunal in the *Rainbow Warrior* case, it seems that it should be retained. However, certain questions have been raised as to its formulation, which need to be discussed.

The formulation of article 32

271. The first question is whether article 32 ought to be limited to cases where human life is at stake, or whether a serious health risk should suffice. The Tribunal in *Rainbow Warrior* seemed to take the broader view, although the health risk to Major Mafart *might* have been life-threatening. The problem here is where to place any lower limit. In situations of distress involving aircraft there will usually be no difficulty in establishing that there is a threat to life, but other cases present an immense spectrum of human difficulties and griefs. Given the context of Chapter V and the likelihood that there will be other solutions available for cases which are not apparently life-threatening, it does not seem necessary to extend the scope of distress in this way. But it does raise a further issue. Clearly, the threat to life must be apparent and have some basis in fact, but is it sufficient that the agent who acted under distress reasonably believed that the danger existed? Or does that agent act at peril, so that if a later and detailed examination shows this was not in truth the case (however it may have appeared at the time), distress will not be available to excuse the breach? In cases of genuine distress there may be neither the time nor the personnel to conduct a proper medical or other examination before acting. In such cases, the agent should be entitled to act on the basis of a reasonable belief as to a situation of distress. For these reasons article 32 should be framed in terms of a reasonable belief in a life-threatening situation.

272. A second question is whether it is desirable to extend article 32 to all cases where threats to life are involved, irrespective of the existence of any special relationship between the State organ or agent and the persons in danger.[508] In the Special Rapporteur's view, article 32 reflects a narrow but historically recognized case of distress involving, in particular, ships and aircraft. It should not be extended too far beyond that specific context, and certainly not into the general field of humanitarian intervention. That is more a matter of necessity than distress, and it will be returned to in the context of article 33.[509]

273. Finally it should be noted that article 32 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening situation. Thus it does not exempt the State or its agent from complying with other requirements (national or international), e.g.,

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[507] Ibid., p. 263 (para. 99). Sir Kenneth Keith dissented on the finding by the Tribunal relating to Major Mafart: while agreeing on the need for medical tests outside the Island of Hao, he argued that the situation was not one of "extreme distress", taking into account the delay of the French authorities in transferring Major Mafart to Paris (ibid., pp. 277–279).

[508] As proposed by the United Kingdom: see para. 267 above.

[509] See paras. 286–287 below.

the requirement to notify arrival to the relevant authorities, or to give relevant information about the voyage, the passengers or the cargo.[510] This follows from the language of article 32, but it should be further stressed in the commentary.

Conclusions on article 32

274. For these reasons article 32 should be retained with substantially the same coverage as at present but with amendments to reflect the suggestions made above. In addition (and by parity of reasoning from the equivalent provision in article 31), distress should only be excluded if the situation of distress results, either alone or in combination with other factors, from a wrongful act of the State invoking it.[511] Finally, the word "extreme" should be deleted, since it does not add anything to the content of the article.[512] It should not be open to a State to argue that, although life was at stake in a situation of unavoidable distress, nonetheless the situation was not sufficiently "extreme".[513]

(e) Article 33: State of necessity

275. Article 33 provides as follows:

> "1. A State of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
>
> (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
>
> (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.
>
> "2. In any case, a State of necessity may not be invoked by a State as a ground for precluding wrongfulness:
>
> (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
>
> (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the State of necessity with respect to that obligation; or
>
> (c) if the State in question has contributed to the occurrence of the State of necessity."

276. The commentary to article 33 distinguishes necessity from consent, countermeasures and self-defence, which depend on the conduct of the "target" State; in that respect it is similar to *force majeure* and distress.[514] But it differs from the latter two circumstances in that a State under *force majeure*, or even a State agent in a situation of distress, has

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[510] See *Cushin and Lewis v. R*, [1935] Ex CR 103 (held: even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). Other cases of this period shed light on the defence: see *The Rebecca* (US-Mexico Claims Commission) (1929) 23 AJIL 860 (vessel entered port in distress; merchandise seized for customs offence: held, entry reasonably necessary in the circumstances and not a mere matter of convenience; seizure therefore unlawful); *The May v R* [1931] SCR 374; *The Ship "Queen City" v. R*, [1931] SCR 387; *R v. Flahaut*, [1935] 2 DLR 685 (test of "real and irresistible distress" applied).

[511] See para. 261 above.

[512] As is effectively conceded in the commentary to article 32, para. (12), note 15 ("virtually superfluous").

[513] For the proposed text, see para. 356 below.

[514] Commentary to article 33, paras. (2)–(3).

effectively no choice but to act in a certain way, whereas "invoking a state of necessity implies perfect awareness of having deliberately chosen to act in a manner not in conformity with an international obligation".[515]

277. In the nineteenth century, justifications of necessity often relied on such so-called "inherent rights" of States as self-preservation, which took priority over the "subjective" rights of other States. The decline of the doctrine of "inherent rights" had correspondingly tended to discredit the idea that necessity might preclude the wrongfulness of conduct.[516] But the plea of necessity is supported by "numerous cases" of State practice, and can be justified by reference to the normal sources of international law, without recourse to any particular theory of the State.[517] The commentary goes on to cite many cases where the plea of necessity was accepted in principle, or at least not rejected, and where the question of its applicability was treated as a question of fact and application.[518]

278. The commentary admits that scholarly opinion on the plea of necessity is sharply divided,[519] suggesting that a further reason for this was the earlier tendency to abuse the doctrine of necessity to cover cases of aggression, annexation or military occupation — including most famously the German justification for the invasion of Belgium and Luxembourg in 1914.[520] Whatever the position in earlier years, "an assault on the very existence of another State or on the integrity of its territory or the independent exercise of its sovereignty" is a contravention of a norm of *jus cogens* and cannot possibly be justified by the doctrine of necessity.[521] But not all conduct infringing the territorial sovereignty of a State need necessarily be considered an act of aggression, or otherwise as a breach of a

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[515] Ibid., para. (3).

[516] Ibid., para. (4).

[517] Ibid., paras. (5)–(6).

[518] These include: the *Russian Indemnity* case, UNRIAA, vol. XI, p. 431, at p. 443 (1912); the arbitral award in *Forests of Central Rhodope (Merits)*, UNRIAA, vol. III, p. 1405 (1933); the decision of the Permanent Court in the Case concerning the *Société Commerciale de Belgique P.C.I.J. Ser. A/B*, No. 78 (1939) (by implication); *Properties of the Bulgarian Minorities in Greece*, Report of a League of Nations Commission of Enquiry, League of Nations, *Official Journal*, 7th year, No. 2 (February 1926), annex 815, p. 209; the case of *Fur Seal Fisheries off the Russian Coast* (1893), text in H. La Fontaine, *Pasicrisie internationale, 1794–1900* (The Hague, Martinus Nijhoff, 1997), p. 426 (and see the correspondence between the Russian and the British Governments in J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, United States Government Printing Office, 1898), vol. I, p. 826); the *Company General of the Orinoco* case, UNRIAA, vol. X, p. 184, at p. 280 (1905); and, more recently, the *Torrey Canyon* incident, as discussed in *The "Torrey Canyon"*, Cmnd. 3246 (London, HMSO, 1967). It was significant in the latter case that there was no protest at the action of the British Government in bombing the ship so as to set fire to the oil threatening to pollute the coast, and indeed that the incident led to the conclusion of an international convention regulating the matter for the future: International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 29 November 1969, United Nations *Treaty Series*, vol. 970, No. 14049; see also United Nations Convention on the Law of the Sea, 1982, article 221. Other individual opinions allowing necessity in certain circumstances include: the Law Officer's Opinion of 22 November 1832 (Jenner), in A. D. McNair (ed.), *International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 231, and the individual opinion of Judge Anzilotti in the *Oscar Chinn* case, *P.C.I.J. Series A/B*, No. 63, p. 89, at pp. 112–114.

[519] For an instructive review of the earlier literature, see commentary to article 33, para. (29). More recent contributions include: J. Barboza, "Necessity (Revisited) in International Law", in J. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague, Martinus Nijhoff, 1984) p. 27; J. Salmon "Faut-il codifier l'état de nécessité en droit international?", ibid., p. 235; J. Raby, "The State of Necessity and the Use of Force to Protect Nationals", *Canadian Yearbook of International Law*, vol. 26, 1988, p. 253.

[520] Commentary to article 33, para. (22).

[521] Ibid.

peremptory norm. The commentary refers to limited measures (e.g., of humanitarian intervention or of protection against the hostile action of armed bands based on foreign territory) which are "restricted to eliminating the perceived danger".[522] The *Caroline* case, though frequently referred to as an instance of self-defence, really involved necessity. The British attack had been directed against private parties for whose conduct the United States was not responsible. Both Secretary of State Webster and President Tyler in their respective replies to the British Government had allowed that conduct might be permissible in case of "clear and absolute necessity",[523] or of "the most urgent and extreme necessity".[524] In the exchange of letters of 1842 which closed the controversy, the two Governments recognized that the "great principle" of inviolability of the territory of another State might be suspended in certain cases of "a strong overpowering necessity", but that this would apply only "for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity".[525]

279. The commentary declines to pronounce on the question whether the invocation of necessity to justify a violation of territorial integrity could be justified under modern international law: this comes down to asking whether the Charter expressly or by implication (e.g., by Article 51) has excluded reliance on necessity as a justification or excuse. But it is not the function of the Commission authoritatively to interpret the Charter provisions on the use of force.[526] The commentary notes, however, that in modern cases of humanitarian intervention, the excuse of necessity has hardly ever been relied on.[527] In almost every such case, "[t]he concept of state of necessity has been neither mentioned nor taken into consideration, even in cases where the existence of consent or a state of self-defence has been contested, and even if some of the facts alleged might relate more to a state of necessity than to self-defence."[528]

280. Finally, the commentary considers the defence of military necessity under the law of war. That doctrine "appears in the first place as the underlying criterion for a whole series of substantive rules of the law of war and neutrality", and not in the confined context of necessity as a circumstance precluding wrongfulness.[529] As to the question whether military necessity is an excuse for non-compliance with international humanitarian law, the answer is clearly that it cannot be: "even in regard to obligations of humanitarian law which are not obligations of *jus cogens* ... to admit the possibility of not fulfilling the obligations imposing limitations on the method of conducting hostilities whenever a belligerent found it necessary to resort to such means in order to ensure the success of a military operation would be tantamount to accepting a principle which is in absolute contradiction with" the relevant conventions: necessity is thus excluded by the terms of the very obligation itself.[530] Although no specific conclusion is reached, the commentary by implication denies any separate existence to a doctrine of "military necessity".

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[522] Ibid., para. (23).

[523] *British and Foreign State Papers*, vol. 29, p. 1129, at p. 1133 (Secretary of State Webster), cited in commentary to article 33, para. (25).

[524] Ibid., vol. 30, p. 194 (President Tyler), cited in commentary to article 33, para. (25).

[525] Ibid., p. 195, at pp. 196 (Ashburton) and 201 (Webster).

[526] Commentary to article 33, para. (25).

[527] Ibid. The only example to 1980 was the Belgian rescue operation in the Congo in 1960. No position was taken by the Security Council on the plea: *Official Records of the Security Council*, 15th yr., 873rd mtg. (esp. pp. 34–39), 877th mtg. (esp. paras. 101, 149, 150), 879th mtg. (esp. p. 29).

[528] Commentary to article 33, para. (26).

[529] Ibid., para. (27).

[530] Ibid., para. (28).

281. The Commission (with one dissentient) concluded that concerns about abuse of necessity are better met by an express provision rather than by silence, and that the idea of necessity is "too deeply rooted in general legal thinking for silence on the subject" to be an appropriate solution.[531] As to the formulation of the principle, the interest concerned has to be essential, but it need not relate only to the "existence" of the State. Indeed the defence of the "existence" of the State (as distinct from the preservation of human life or of the environment) has rarely been considered a justification, since the purpose of the positive law of self-defence is to safeguard that existence. But no a priori definition of an essential interest can be offered. "The extent to which a given interest is 'essential' naturally depends on all the circumstances in which the State is placed in different specific situations; the extent must therefore be judged in the light of the particular case into which the interest enters, rather than be predetermined in the abstract."[532] In addition, the danger to that interest must be "extremely grave" and "imminent", and such that a breach of the international obligation is the only method of avoiding the peril.[533] Necessity cannot be invoked in cases where an equal interest of the other State was involved,[534] nor in cases of breach of a peremptory norm,[535] nor in cases where the invocation of necessity is expressly or impliedly excluded by a treaty.[536]

Comments of Governments on article 33

282. Despite the doctrinal controversy it has provoked, rather few Governments have commented on article 33. Denmark (on behalf of the Nordic countries)[537] and France[538] accept the principle embodied in article 33. Only the United Kingdom does not, citing the risk of abuse.[539] But it does accept that environmental emergencies can arise, posing an immediate threat to the territory of a State, in circumstances akin to *force majeure* or distress, and as noted above, it argues for a wider rule of distress allowing humanitarian action even in relation to persons not entrusted to the care of the State agent concerned.[540] In an earlier comment, Mongolia noted the difficulty of balancing individual State interests against international obligations and remarked that "[i]f article 33 is to remain in the draft, it must be so formulated that the state of necessity is subject to strict conditions and limitations which prevent all possibility of abuse".[541]

Experience in the application of the doctrine of necessity since the adoption of draft article 33

283. In the *Rainbow Warrior* arbitration, the Tribunal expressed doubt as to the existence of the excuse of necessity, although the point did not need to be developed since France did not rely on that excuse (as distinct from distress and *force majeure*). The Tribunal referred to the draft articles and said:

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[531] Ibid., para. (31).
[532] Ibid., para. (32).
[533] Ibid., para. (33).
[534] Ibid., para. (35).
[535] Ibid., para. (37).
[536] Ibid., para. (38).
[537] A/CN.4/488, p. 87, but reserving the right to comment in further detail.
[538] Ibid.
[539] Ibid., p. 88.
[540] See para. 267 above, and for discussion, para. 272 above.
[541] *Yearbook ... 1981*, vol. II, Part One, p. 76.

> "... article 33, which allegedly authorizes a State to take unlawful action invoking a state of necessity, refers to situations of grave and imminent danger to the State as such and to its vital interests. This distinction between the two grounds justifies the general acceptance of article 32 and at the same time the controversial character of the proposal in article 33 on state of necessity."[542]

284. By contrast, in the *Case concerning the Gabcikovo-Nagymaros Project*, the International Court carefully considered an argument based on article 33, expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the principle itself, it noted that the parties had both relied on article 33 as an appropriate formulation,[543] and continued:

> "The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in article 33 of its draft ... Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.
>
> "In the present case, the following basic conditions set forth in draft article 33 are relevant: it must have been occasioned by an 'essential interest' of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a 'grave and imminent peril'; the act being challenged must have been the 'only means' of safeguarding that interest; that act must not have 'seriously impair[ed] an essential interest' of the State towards which the obligation existed; and the State which is the author of that act must not have 'contributed to the occurrence of the state of necessity'. Those conditions reflect customary international law."[544]

As to the application of the principle, the Court agreed that the Hungarian concerns as to the environment and drinking water related to an "essential interest" for the purposes of article 33, citing certain passages in the commentary.[545] But it denied that the mere existence of uncertainties as to the environmental effects of the Project could, "alone, establish the objective existence of a 'peril' in the sense of a component element of a state of necessity". The "peril" had to be objectively established and not merely apprehended as possible.[546] In addition to being "grave", the peril had to be "imminent" in the sense of "proximate". But, it added:

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[542] UNRIAA, vol. XX, p. 217 (1990), at p. 253. In *Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi*, *Revue belge de droit international*, 1990, p. 517; (1994) 96 ILR 279, the Tribunal declined to comment on the appropriateness of codifying the doctrine of necessity, noting that the measures taken by Burundi did not appear to have been the only means of safeguarding an essential interest against a grave and imminent peril.

[543] *I.C.J. Reports 1997*, p. 7, at p. 39 (para. 50). It should be noted that no issue of obligations *erga omnes* arose in that case, which concerned a bilateral treaty. See para. 290 below.

[544] Ibid., at pp. 40–41 (paras. 51–52). None of the separate or dissenting judges disagreed with the Court in its endorsement of article 33.

[545] Ibid., at p. 41 (para. 53).

[546] Ibid., at pp. 41–42 (para. 54).

> "That does not exclude, in the view of the Court, that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable."[547]

Crucially, the Court was not convinced that, whatever the uncertainties and risks, the unilateral suspension and subsequent abandonment of the Project by Hungary was the only course open in the circumstances, having regard in particular to the amount of work already done and money expended on it. It noted that many of the concerns related to the operation of the scheme in peak mode, and that it had not yet been agreed whether or to what extent that mode would be adopted.[548] Having regard to the previous conduct of the parties, the state of the works, the scientific uncertainties and the existence of other possibilities to resolve the problems, the Court concluded that Hungary had failed to prove the existence of a grave and imminent peril sufficient to justify its conduct.[549] In addition, since Hungary had "helped, by act or omission, to bring" about the situation of alleged necessity, it could not now rely on that situation as a circumstance precluding wrongfulness.[550] It was accordingly not necessary to consider whether the interests of Czechoslovakia in the continuation of the Project would have been a sufficient countervailing factor in accordance with draft article 33 (1) (b).[551]

285. The plea of necessity was also, apparently, raised in the *Fisheries Jurisdiction Case (Jurisdiction) (Spain v. Canada)*, in circumstances which bore some resemblance to the *Russian Fur Seals* case a century earlier.[552] Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization but had, in Canada's opinion, proved ineffective for various reasons. By the Coastal Fisheries Protection Act 1994, Canada declared that the straddling stocks of the Grand Banks were "threatened with extinction", and asserted that the purpose of the Act and regulations was "to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding". Pursuant to the Act, Canadian officials subsequently boarded and seized a Spanish fishing ship, the *Estai*, on the high seas, leading to a conflict with the European Union and with Spain. The Spanish Government denied that the arrest could be justified by concerns as to conservation "since it violates the established provisions of the NAFO Convention to which Canada is a party".[553] Canada disagreed, asserting that "the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen".[554] The European Union, in its protest of 10 March 1995, said, *inter alia*, that:

> "The arrest of a vessel in international waters by a State other than the State of which the vessel is flying the flag and under whose jurisdiction it falls, is an illegal act under both the NAFO Convention and customary international law and cannot be justified *by any means*." (emphasis added)

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[547] Ibid., at p. 42 (para. 54).

[548] Ibid., at pp. 42–43 (para. 55).

[549] Ibid., at pp. 42–45 (paras. 55–56).

[550] Ibid., at pp. 45–46 (para. 57).

[551] Ibid., at p. 46 (para. 58).

[552] See the judgment of the International Court of 4 December 1998, declining jurisdiction. For the *Russian Fur Seals* case see note 518 above.

[553] As cited in the judgment of 4 December 1998, para.20.

[554] Ibid. See further the Canadian Counter-Memorial (February 1996), paras. 17–45.

But the subsequent Spanish Memorial dealt with issues of justification at some length. Without expressly referring to draft article 33, it seems on the whole to have taken the position that the Canadian measures could not be justified because they were in conflict with an international convention to which both Spain and Canada were parties and which directly regulated the conservation of halibut fisheries.[555] In other words, the plea of necessity was not rejected a priori. The Court held that it had no jurisdiction over the case; the claim was, however, neither formally pleaded nor adjudicated on the merits.

Article 33 and humanitarian intervention

286. One of the issues discussed at some length in the commentary is the relationship between the plea of necessity as a circumstance precluding wrongfulness and the doctrine of humanitarian intervention as a ground for the use of force on the territory of another State. There are two difficulties here. First of all, of course, is the continuing controversy over whether and to what extent measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law. This is not a question on which the Commission can take a position in formulating the secondary rules of responsibility, nor does the commentary purport to do so. But there is a second difficulty, in that article 33 expressly excludes from the scope of the plea of necessity violations of peremptory norms of international law, among which the rules relating to the use of force referred to in Articles 2 (4) and 51 of the Charter certainly rank. Thus it could be argued that article 33, while purporting not to take a position on the exception of humanitarian intervention, in fact does so, since such an exception cannot stand with the exclusion of obligations under peremptory norms. The commentary appears to suggest that this difficulty can be avoided by differentiating between the peremptory status of some aspects of the rules relating to the use of force (e.g., the prohibition of aggression) and the non-peremptory status of other aspects (e.g., the injunction against a use of force even when carried out for limited humanitarian purposes).[556] By implication, therefore, necessity can excuse the wrongfulness of genuine humanitarian action, even if it involves the use of force, since such action does not, at any rate, violate a peremptory norm.

287. This construction raises complex questions about the "differentiated" character of peremptory norms which go well beyond the scope of the draft articles. For present purposes it seems enough to say that either modern State practice and *opinio juris* license humanitarian action abroad in certain limited circumstances, or they do not. If they do, then such action would appear to be lawful in those circumstances, and cannot be considered

[555] See Mémoire Du Royaume d'Espagne (September 1995), chap. II. By an Agreed Minute between the EU and Canada, Canada agreed that it would repeal the regulations applying the 1994 Act to Spanish and Portuguese vessels in the NAFO area and release the *Estai*. The parties expressly maintained their respective positions "on the conformity of the amendment of 25 May 1994 to Canada's Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention" and reserved "their ability to preserve and defend their rights in conformity with international law". See Canada-European Community, Agreed Minute on the Conservation and Management of Fish Stocks, Brussels 20 April 1995, 34 ILM 1260 (1995). See also the Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (A/CONF.164/37), 8 September 1995 (not yet in force), which goes beyond the pre-existing law in excluding non-participating "third States" from fishing in areas of the high seas subject to a conservation regime (articles 8 (4), 17 (2)), and in allowing certain enforcement measures by States parties as against other States parties (article 21).

[556] Commentary to article 33, paras. (21)–(26).

as violating the peremptory norm reflected in Article 2 (4) of the Charter.[557] If they do not, there is no reason to treat them differently than any other aspect of the rules relating to the use of force. In either case, it seems than the question of humanitarian intervention abroad is not one which is regulated, primarily or at all, by article 33. For these reasons, it is suggested that the exception in article 33 for obligations of a peremptory character should be maintained.

The issue of scientific uncertainty

288. A major question for article 33 is that of scientific uncertainty, and the associated question of the precautionary principle.[558] At present, article 33 requires that the conduct in question must be "the only means of safeguarding an essential interest of the State against a grave and imminent peril". Yet in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be substantial areas of scientific uncertainty, and different views may be taken by different experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances. This has already been considered in the context of distress: it was concluded that in the context of saving life, the agent concerned should be entitled to act on the basis of a reasonable belief as to a situation of distress.[559] The question is whether similar latitude should be allowed in relation to the plea of necessity.

289. The plea of distress covers cases of action to save individual human lives, whereas the plea of necessity covers a wider range of contingencies. The first point to be noted in relation to the latter is that the concern in question is that of safeguarding against peril, i.e., against an extremely serious risk. By definition the peril will not yet have occurred, and it cannot be required that the invoking State prove that it would *certainly* have occurred otherwise. It is difficult and may be impossible to prove a counter-factual. In the *Gabcikovo-Nagymaros* case[560] the Court noted first that the invoking State could not be the sole judge of the necessity, and secondly that the existence of scientific uncertainty was not enough, of itself, to establish the existence of an imminent peril. This is plainly right, but on the other hand, neither should a measure of scientific uncertainty about the future disqualify a State from invoking necessity, if the peril is established on the basis of the evidence reasonably available at the time (as based, for example, on a proper risk assessment procedure), and the other conditions laid down for necessity are met. This is consistent with principle 15 of the Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development in 1992, which provides that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". This principle has received general support, and is reflected, for example, in article 5.7 of the 1994 WTO Agreement on the Application of Sanitary and Phytosanitary Measures.[561]

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[557] Similar reasoning would apply to the controversy over whether "anticipatory" self-defence is ever permissible. If it is in specific circumstances, article 33 would appear to be unnecessary. If it is not, then there is no reason why article 33 should be available to preclude responsibility for anticipatory action.

[558] Generally on the precautionary principle see P. Sands, *Principles of International Environmental Law* (Manchester, Manchester University Press, 1995), pp. 212–213; P. Daillier and A. Pellet, *Droit international public, 6th ed.* (1999), p. 1255. The principle has frequently been applied by national courts: see, e.g., *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715 (India, Supreme Court).

[559] See para. 281 above.

[560] See para. 284 above.

[561] Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, in The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts (Geneva, WTO, 1994), p. 69.

Article 5.7 provides that a WTO member may provisionally adopt sanitary or phytosanitary measures (and restrict imports) "where relevant scientific evidence is insufficient". In the *Beef Hormones* case the WTO Appellate Body recognized that a WTO member may rely on a risk assessment procedure conducted under articles 5.1 and 5.2 of the 1994 Agreement notwithstanding that such an assessment indicated a "a state of scientific uncertainty".[562] The question is whether the language of article 33 should be amended expressly to incorporate a precautionary element.[563] The cases for and against are rather evenly balanced, but given the need to keep the defence of necessity within tight bounds, and the possibility of reflecting that element in the commentary, no change has been made.

The formulation of article 33

290. As to the formulation of article 33, three further issues should be mentioned, in ascending order of difficulty:

- The term "State of necessity" can be retained in the title to article 33, but to avoid confusion with the other sense of "State" in the text, a reference to "necessity" alone seems sufficient;

- Article 33 (2) (b) contemplates that the plea of necessity may be excluded, expressly or impliedly, by an obligation arising out of a treaty, and this is clearly correct in principle.[564] But there is no reason why this limiting effect can only be produced by a treaty. The draft articles proceed on the basis that, generally speaking, obligations arising from treaties and from other sources of international law have similar consequences in the realm of responsibility.[565] For example, if a treaty rule protecting a particular value or interest excludes the plea of necessity, why should a customary rule generated in parallel with that treaty by widespread and convergent practice, and having essentially the same content, not have the same effect? Paragraph (2) (b) should be amended accordingly;

- Article 33 (1) (b) stipulates that, for necessity to be invoked, the conduct of the invoking State must not "seriously impair an essential interest of the State towards which the obligation existed". This language is not well adapted to the breach of an obligation *erga omnes*. For example, it is not clear what individual interest Ethiopia and Liberia had in the *South West Africa* cases, as distinct from the public interest in compliance with the relevant norm.[566] But South Africa could not have invoked necessity against those States on the basis that no essential interest of theirs was seriously impaired. The relevant interest for that purpose was that of the people of South West Africa itself. Of course, many obligations *erga omnes* involve peremptory norms, which are excluded entirely from the scope of article 33. Moreover, in the case of an obligation *erga omnes* (e.g., in the field of human rights or international peace and security), the obligation itself may expressly or impliedly exclude

[562] *EC Measures concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, 16 January 1998, para. 194.

[563] An alternative version of article 33, expressly reflecting the precautionary principle, might read as follows: "(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril, the occurrence of which could not reasonably be excluded on the best information available".

[564] Thus the provisions of human rights treaties excluding derogations from certain fundamental rights even in time of public emergency impliedly exclude reliance on article 33. But see J. Oraá, *Human Rights in States of Emergency in International Law* (Oxford, Clarendon Press, 1992), pp. 220–226, stressing the similarities between the derogation clauses and the plea of necessity.

[565] See para. 26 above for a discussion of this principle in the context of former article 17.

[566] It was precisely because of the lack of such an individual interest that a narrow majority of the Court held their claim inadmissible: *I.C.J. Reports 1966*, p. 6.

reliance on necessity. Nonetheless, circumstances can be envisaged of a single unforeseen case where the interests at stake in compliance with an *erga omnes* obligation ought not to prevail over a claim of necessity. In such cases the balance to be struck by paragraph (1) (b) is not a balance between the interests of the respondent State and the individual interests of the State or States complaining of a breach. What matters is the extent of the injury to the interests protected by the obligation, and paragraph (1) (b) should be reformulated accordingly.

Conclusions on article 33

291. Overall it seems that concerns as to the possible abuse of necessity are not borne out by experience. There is a parallel here with the *rebus sic stantibus* principle in the law of treaties. This was for a long time treated with considerable reserve, but it was embodied in carefully limited terms in the Vienna Convention on the Law of Treaties,[567] and it has not had the destabilizing effect some feared it would have.[568] It should also be stressed that (unlike *rebus sic stantibus*) the plea of necessity only operates by way of a temporary preclusion of wrongfulness. Overall it seems that the considerations set out in article 33 allow a reasonable balance to be struck between the interests of the States concerned and those of the international community as a whole. The International Court in the *Gabcikovo-Nagymaros* case was able to apply the principle without undue difficulty and it also, as we have seen, made a clear and helpful distinction between its proper role as a precluding factor and the continuity and stability of the underlying treaty relationship.[569] For these reasons, the Special Rapporteur favours the retention of article 33 essentially in its present form, but with the amendments referred to above.[570]

(f) Article 34: Self-defence

292. Article 34 provides as follows:

> "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations."

293. The commentary to article 34 stresses that it is concerned with the principle of self-defence only insofar as it is a circumstance precluding wrongfulness covered by Chapter V, and that consequently it is not concerned to define the extent of lawful self-defence or to enter into the various controversies which have arisen about self-defence under the Charter.[571] Article 34 is thus presented as "the inevitable inference" from the inherent right of self-defence as referred to in Article 51 of the Charter. The commentary notes that self-defence usually involves the use of force, in apparent contrast with lawful countermeasures which may not,[572] but it declines to be drawn into such questions as "any total identity of content between the rule in Article 51 of the Charter and the customary rule of international law on self-defence"; it is sufficient "to remain faithful to the content and scope of the

[567] Article 62 is formulated in the negative ("A fundamental change of circumstances ... may not be invoked as a ground for terminating or withdrawing from the treaty unless ..."). Article 33 is the only circumstance in Chapter V formulated in similar negative terms.

[568] The parallel is relied on in the commentary to article 33, para. (40).

[569] See para. 224 above.

[570] For the actual language proposed see para. 356 below.

[571] Commentary to article 34, para. (1).

[572] Ibid., para. (6).

pertinent rules of the Charter of the United Nations".[573] However, the article as drafted does not refer in terms to Article 51, a matter which gave rise to some disagreement within the Commission at the time of adoption of article 34.[574]

294. The commentary goes on to stress that the preclusive effect of article 34 does not entitle the State acting in self-defence to violate the rights of third States.[575] In this respect self-defence is subject to the same limitation as countermeasures.

Comments of Governments on article 34

295. France believes that the reference to self-defence "in conformity with the Charter of the United Nations" is too narrow, and that the broader limits laid down by international law should be referred to instead.[576] Apart from this comment, the inclusion of article 34 in Chapter V appears uncontroversial.

How far does the preclusive effect of article 34 extend?

296. However, there is a central difficulty with article 34, which was referred to in an earlier observation of Mongolia. Complaining of the formulation of article 34, Mongolia noted that "[a]cts of a State constituting self-defence do not violate any international obligation whatsoever of any State. Hence what is 'unlawful' cannot be part of the concept of self-defence."[577] This is plainly right so far as concerns the core obligation under Article 2 (4) of the Charter not to use force in international relations. So far as that obligation is concerned, the exclusion of action in self-defence is part of the definition of the obligation itself. A State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2 (4), and if the only effect of self-defence as a circumstance precluding wrongfulness is so to provide, then it should be deleted, for the same reasons as already given with respect to consent.[578]

297. But in the course of self-defence, a State may violate other obligations towards the aggressor. For example, it may trespass on its territory, interfere in its internal affairs, disrupt its trade contrary to the provisions of a commercial treaty, etc. Traditional international law dealt with these problems to a great extent by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war.[579] In the Charter period, by contrast, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at "peace" with each other.[580] Indeed the legality of a formal state of war in the Charter period has been doubted. The Vienna Convention on the Law

[573] Ibid., para. (20).

[574] Ibid., para. (26).

[575] Ibid., para. (28).

[576] A/CN.4/488, p. 89.

[577] *Yearbook ... 1981*, vol. II, Part One, p. 76.

[578] See paras. 236–239 above. Cf. *Threat or Use of Nuclear Weapons (Advisory Opinion), I.C.J. Reports 1996*, p. 226, at p. 244 (para. 38), p. 263 (para. 96), emphasizing the lawfulness of a use of force in self-defence.

[579] See further A. McNair and A. D. Watts, *Legal Effects of War*, 4th ed. (Cambridge University Press, 1966).

[580] In the *Case concerning Oil Platforms, I.C.J. Reports 1996*, p. 803, it was not denied that the Treaty of Amity of 1955, which provides the basis of Iran's claim, remained in force at all relevant times, despite many actions by United States naval forces against Iran, justified as self-defence, during the relevant period. In that case both parties agreed that to the extent that any such operations were justified by self-defence they would be lawful.

of Treaties leaves such issues to one side by providing in article 73 that the Convention does not prejudice "any question that may arise in regard to a treaty ... from the outbreak of hostilities between States".

298. Thus it seems clear that there are cases where self-defence may preclude the wrongfulness of conduct which would otherwise be in breach of treaty or other obligations of the State concerned, even though no question can possibly arise, for a State acting in self-defence, of action contrary to the basic obligation under Article 2 (4) of the Charter. But the problem is that self-defence does *not* preclude the wrongfulness of conduct vis-à-vis the aggressor State in all cases or with respect to all obligations. The issue is not of course whether the particular action was or was not necessary or proportionate, since that is part of the definition of self-defence. It is that there are some obligations which cannot be violated even in self-defence. The most obvious examples relate to international humanitarian law and human rights obligations. The Geneva Conventions of 1949 and Protocol I thereto of 1977 apply equally to aggressors and defenders, and the same is true of customary international humanitarian law.[581] All the human rights treaties contain derogation provisions for times of public emergency, including actions in self-defence.[582] It is perfectly clear that self-defence does not preclude the wrongfulness of conduct in breach of obligations in these fields.

299. The problem is accordingly to distinguish between those obligations which prevail even over a possibly justified claim of self-defence and those which do not. Curiously, neither the commentary nor the debates on article 34 shed much light on this question.[583] However, the International Court did do so in its advisory opinion on the *Threat or Use of Nuclear Weapons*. One issue was whether the use of nuclear weapons must be a breach of environmental obligations because of the massive and long-term damage such weapons caused. The Court said:

> "[T]he issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether *the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict*. The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality."[584]

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[581] As the Court said of the rules of international humanitarian law in *Threat or Use of Nuclear Weapons (Advisory Opinion), I.C.J. Reports 1996*, p. 226, at p. 257 (para. 79), they constitute "intransgressible principles of international humanitarian law". On the relationship between human rights and humanitarian law in time of armed conflict, see ibid., p. 240 (para. 25).

[582] See J. Oraá, *Human Rights in States of Emergency in International Law* (Oxford, Clarendon Press, 1992) esp. chaps. 4, 9.

[583] This is the more curious in that the precise issue is perceptively analysed in the commentary, and the appropriate conclusion reached, in relation to article 33: see para. 280 above. However, Riphagen indirectly referred to that issue in the course of the debate on article 34, stating in particular that "the rules of *jus cogens* relating to the protection of human rights in armed conflicts remained valid even in the relationship with an aggressor State" (*Yearbook* ... 1980, vol. One, p. 189). He added later that "[a]ny act — including genocide or a serious violation of human rights, which were not lawful measures — could be described as self-defence. Consequently, the inclusion of the word 'lawful' [in the text of article 34] was essential" (ibid., p. 272).

[584] *I.C.J. Reports 1996*, at p. 242 (para. 30) (emphasis added).

Although the Court did not approach the issue using the terminology of "circumstances precluding wrongfulness" or by referring to article 34, the issue being considered here is precisely the same. In what circumstances is a State acting in self-defence "totally restrained" by an international obligation? The answer is that it depends on whether the obligation was expressed or intended to apply as a definitive constraint even to States in armed conflict. For international humanitarian law, this clearly is the case; similarly for human rights law, subject to the possibility of derogation in time of emergency which is part and parcel of that law. Another example would be a unilateral commitment by a nuclear-weapon State that it would not engage in a first use of nuclear weapons in any circumstances. For other general obligations, by contrast (e.g., those relating to trade and the environment), the answer may be different, but it depends on the formulation and purpose of the primary rule in question. A treaty concerned precisely with protection of the environment in time of armed conflict[585] will be intended, subject to its terms, as an "obligation of total restraint" and the plea of self-defence will not preclude wrongfulness. Accordingly, article 34 needs to embody language which distinguishes between the two categories. Adopting the language of the Court, it is suggested that article 34 should be subject to an exception for obligations which are "expressed or intended to be obligations of total restraint even to States engaged in armed conflict or acting in self-defence". In addition it is useful for the sake of clarity and to confirm a vital principle of the law of armed conflict to give, as an example of such obligations, those in the field of international humanitarian law.

The position of third States

300. The commentary to article 34 emphasizes that the principal effect of the article is to preclude the wrongfulness of conduct of a State acting in self-defence vis-à-vis the attacking State,[586] and this is plainly correct as a general proposition. In the advisory opinion on the *Threat or Use of Nuclear Weapons*, the Court observed that:

> "[A]s in the case of the principles of humanitarian law, applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the Charter of the United Nations), to all international armed conflict, whatever type of weapons may be used."[587]

This rather convoluted formulation may have been adopted to indicate that the law of neutrality, while it clearly distinguishes between conduct as against a belligerent and conduct as against a neutral, does not imply that neutral States are unaffected by the existence of a state of war. A State exercising an inherent right of self-defence of a State has certain belligerent rights, even as against neutrals. The extent to which the traditional law of neutrality has survived unchanged in the Charter period is still controversial, but fortunately the Commission does not need to enter into these controversies in this context. The language of article 34 leaves open all issues of the effect of action in self-defence vis-à-vis third States, and no alteration seems required.

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[585] E.g., Multilateral Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 10 December 1976, United Nations, *Treaty Series*, vol. 1108, No. 17119.

[586] Commentary to article 34, para. (28).

[587] *I.C.J. Reports 1996*, at p. 261 (para. 89).

The formulation of article 34

301. Finally, France and (in an earlier comment) Mongolia question the simple reference in article 34 to self-defence in conformity with the Charter of the United Nations.[588] However, these suggestions are opposed to each other: France seeks a reference to what it regards as the wider right of self-defence under general international law, whereas Mongolia seeks an express reference to Article 51. In the Special Rapporteur's opinion, it is neither necessary nor desirable to resolve underlying questions about the scope of self-defence in modern international law — even if it were possible to do so in the draft articles, which having regard to Article 103 of the Charter it is not. It is not the function of the draft articles to specify the content of the primary rules, including that referred to in Article 51. Article 34 uses the phrase "a lawful measure of self-defence taken in conformity with the Charter of the United Nations", and this is a sufficient reference to the modern international law of self-defence, customary and conventional. No change to article 34 is proposed in this respect.

Conclusions on article 34

302. For these reasons it is recommended that article 34 be retained, but that a new paragraph be added to distinguish in general terms between those obligations which prevail even as against a State exercising a right of self-defence, and those which do not.[589]

(g) Article 35: Reservation as to compensation for damage

303. Article 35 provides as follows:

> "Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudge any question that may arise in regard to compensation for damage caused by that act."

Article 35 is the only provision in Chapter V which deals with the consequences (substantive or procedural) of invoking circumstances precluding wrongfulness. It is proposed to deal with it in that context, and after considering whether any additional circumstances ought to be provided for.[590]

4. Possible justifications or excuses not included in Chapter V

304. Although the Commission saw six circumstances originally enumerated in Chapter V as the main generally applicable ones, it evidently did not regard the list as "absolutely exhaustive", and noted the possibility of the development of further general or specific excuses for wrongful conduct. In its view, Chapter V was "not to be construed as closing the door on that possibility".[591] This raises a number of questions for the Commission on second reading. First, are there other circumstances precluding wrongfulness of a general character which ought to be recognized in Chapter V? Secondly, what provision — if any — is necessary to deal with the possibility that new excuses for non-performance might arise in the future? The second question is dealt with in the context of Chapter 1 of Part Two, since it concerns the effect of the draft articles as a whole. The first question is addressed below.

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[588] See para. 295 above, and for Mongolia's comment, *Yearbook* ... 1981, vol. II, part One, p. 76.

[589] For the proposed formulation of the article see para. 356 below. For its location, see para. 355 below.

[590] See paras. 336–347 below.

[591] Commentary to article 34, para. (29).

305. Different legal systems, in fact, recognize different ranges of justifications or excuses for non-performance of obligations, and the review undertaken earlier of the evolution of Chapter V shows that a number of other candidates for inclusion have been considered at various times.[592] It is necessary to mention three of them.

(a) Performance in conflict with a peremptory norm (*jus cogens*)

306. Articles 53 and 64 of the Vienna Convention on the Law of Treaties deal with cases where the provisions of a treaty are themselves in contradiction with an existing or new peremptory norm, in which case the consequence is the invalidity or termination of the treaty. Moreover, those cases are regarded so seriously that the offending provision is inseparable, i.e., the whole treaty is invalid, even if only one of its provisions is impugned.[593] But there is a third possibility. A treaty, apparently lawful on its face and innocent in its purpose, might fail to be performed in circumstances where its performance would produce, or substantially assist in, a breach of a peremptory norm. An example might be where a treaty right of passage through a strait or overflight through the airspace of a State was being exercised in order to commit an act of aggression against another State, or where weapons promised to be provided under an arms supply agreement were to be used to commit genocide or crimes against humanity. There is no reason in such cases why the treaty itself should be void or should terminate. It is not intrinsically unlawful, and no new peremptory norm is involved. It is simply that, as a result of extrinsic circumstances, the performance of the treaty would violate, or lead directly to the violation of, a peremptory norm. In such cases the question is whether "non-performance of a treaty stipulation which conflicts with a rule of *jus cogens* — provided that the conflict is properly established — should not be considered a ground [i.e. a justification] for a breach of that treaty".[594] At the level of principle, the answer must surely be yes. If a peremptory norm invalidates an inconsistent treaty, how can the obligation to perform the treaty stand against the breach of such a norm? No doubt the link between performance of the treaty obligation and breach of the peremptory norm would have to be clear and direct. But in such cases, the temporary suspension of the obligation to perform surely follows from the peremptory character of the norm that would otherwise be violated.

307. On the other hand, there is a question as to how this result is to be achieved. In many cases it will be sufficient to interpret the relevant treaty rule as not requiring the conduct in question, in the same way as direct conflict between treaties and peremptory norms will usually be avoided by interpretation.[595] However, the relevant rule may be clear, and so too the conflict with the peremptory norm in the given circumstances.

308. Fitzmaurice treated this question under the heading "Non-performance justified *ab intra* by virtue of a condition of the treaty implied in it by international law", and specifically

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[592] See para. 215 above.

[593] Vienna Convention on the Law of Treaties, article 44 (5). Article 64 states that in the case of a new peremptory norm, "any existing treaty which is in conflict with that norm becomes void and terminates". Thus the whole treaty terminates if any provision of it is in conflict with a peremptory norm.

[594] Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1984), p. 63. The author adds that "it is difficult to foresee this hypothesis in concrete terms" (ibid.).

[595] This discussion focuses on the potential conflict between treaty performance and a peremptory norm. In the case of a rule of customary international law, the possibility of conflict is much less, but it is not excluded.

on the basis of an implied condition of "continued compatibility with international law",[596] noting that:

> "A treaty obligation the observance of which is incompatible with a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility ... The same principle is applicable when circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty."[597]

No similar rule applied to "a rule in the nature of *jus dispositivum*", since the parties were free to contract out of such a rule, including prospectively.

309. It should be stressed that, in the passage quoted, Fitzmaurice evidently did not contemplate either the invalidity of the treaty or its termination. His focus was on the question of non-observance, in a situation of what might be referred to as occasional conflict or inconsistency. A treaty which is on its face inconsistent with a peremptory norm no doubt cannot stand, but few treaties are of this character. Cases of "occasional conflict" are much more likely, and it is not clear why these should entail total invalidation.[598] Moreover, it should again be noted that under the Vienna Convention on the Law of Treaties, it is necessary that a State should take action to invoke some ground for invalidity or termination, and this includes action pursuant to articles 53 and 64. A State may be reluctant to see a treaty invalidated or terminated as a whole, yet it may be legitimately concerned as to a specific case of performance of the treaty conflicting with the demands of a peremptory norm.[599] In the event of such a conflict, there is, anyway, no room of election or for an option as between the two conflicting norms.

310. As various comments on the draft articles indicate, a number of Governments continue to harbour concerns about the notion of *jus cogens*.[600] These relate, it seems, not so much to a lack of support for the substantive values embodied in the relatively few indisputable *jus cogens* norms (the prohibitions against genocide, slavery, crimes against humanity and torture, the prohibition of aggression, and a few others), as to the worry that the notion is radically indeterminate and will destabilize treaty relations. But in nearly 20 years since the Vienna Convention of 1969 came into force there has been no case where *jus cogens* has been invoked to invalidate a treaty. During the same period, tribunals, national and international, have affirmed the idea of peremptory norms in various contexts, not limited to the validity of treaties.[601] The International Court, while so far avoiding the use of the term itself, has also endorsed the notion of "intransgressible rules".[602]

311. In the Special Rapporteur's view, there can be no going back on the clear endorsement of the notion of peremptory norms contained in the 1969 and 1986 Conventions. According

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[596] Fitzmaurice, Fourth Report, *Yearbook* ... 1959, vol. II, p. 46.

[597] Ibid.

[598] Any more than the "occasional" inconsistency between a Security Council resolution and the Montreal Convention of 1971 invalidated the latter: see paras. 9 and 24 above.

[599] Cf. the remarks of Judge ad hoc Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Further Requests for the Indication of Provisional Measures), I.C.J. Reports 1993* at pp. 439–441. The Court did not address these issues in its Order.

[600] See para. 234 above.

[601] See, e.g., the decisions of the Yugoslav Tribunal in *Prosecutor v. Anto Furundzija*, 10 December 1998, unreported, and of the English House of Lords in *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 97, esp. at pp. 108–109, 114–115 (Lord Browne-Wilkinson).

[602] *Threat or Use of Nuclear Weapons (Advisory Opinion), I.C.J. Reports 1996*, p. 226, at p. 257 (para. 79).

to article 53 common to the two Conventions, a peremptory norm of general international law is one from which no derogation is permitted, except by a later norm of the same status. It follows from this definition that obligations generated by a peremptory norm must prevail over other obligations in case of conflict. The Special Rapporteur thus agrees with Fitzmaurice and Rosenne that, once the peremptory character of a norm of *jus cogens* is clearly recognized, that norm must prevail over any other international obligation not having the same status. Indeed in such cases the State concerned would not have the choice whether or not to comply: if there is inconsistency in the circumstances, the peremptory norm must prevail. On the other hand, the invalidation of a treaty which does not in terms conflict with any peremptory norm, but whose observance in a given case might happen to do so, seems both unnecessary and disproportionate. In such cases, the treaty obligation is, properly speaking, inoperative[603] and the peremptory norm prevails. But if the treaty can in future have applications not inconsistent with the peremptory norm, why should it be invalidated by such an occasional conflict? Certainly, an occasional conflict with a non-peremptory norm of customary international law (which may have the same content as a treaty) would not invalidate the customary rule for the future.

312. Is such a conflict to be resolved at the level of the secondary rules, or is it not (like consent[604]), more properly considered part of the formulation of the primary obligation? The position is not the same as it is with respect to consent since, as argued above, the consent requirement is intrinsic to the *particular* norm or obligation, whereas the effect of peremptory norms is extrinsic to that norm or obligation and arises as an aspect of the system of international law. Nonetheless in some respects at least the impact or effect of peremptory norms occurs prior to and independently of the secondary rules of responsibility — for example, in the case of article 53 of the Vienna Convention itself. If a treaty is invalid, no obligation arises to which Chapter V can apply. But is this always the situation? The question may be asked in the following way: when the draft articles speak of the obligations of States in accordance with the applicable primary rules, do they nonetheless conceive of those obligations as general in form? Or are they obligations applicable to the specific States concerned in the specific circumstances of each particular case? In short, are the obligations referred to in articles 3 (a) and 16 general in character, or are they highly individualized and specified? The latter conception, rigorously applied, might dissolve Part One of the draft articles altogether, referring everything to the auspices of the primary rules. Yet this does not seem a useful result or one consistent with the development of a systematic approach to State responsibility. Thus it seems sensible still to think of the obligations which are the subject of the draft articles as being, or at least as including, obligations of a general character. By the same token, it seems appropriate to reflect the overriding impact of peremptory norms *in casu* — in situations of occasional conflict — as a circumstance precluding wrongfulness under Chapter V of Part One.[605]

313. Accordingly, Chapter V should contain a provision to the effect that the wrongfulness of an act of a State not in conformity with an international obligation is precluded if the act is required in the circumstances by a peremptory norm of general international law. It should be stressed that nothing less than direct conflict between the two obligations, that is to say,

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[603] See paras. 225–226 above.

[604] See para. 241 above.

[605] The "nominalist" approach to obligations, which is rejected here, might have further consequences for Chapter V. It would reinforce a very narrow conception of the chapter (covering only circumstances precluding responsibility, not wrongfulness). It would tend to the exclusion of article 34 on self-defence.

an impossibility to comply at the same time with both in the circumstances that have arisen, can be sufficient for this purpose.[606]

(b) The "*exceptio inadimplenti non est adimplendum*"

314. The maxim "*exceptio inadimplenti non est adimplendum*" (often referred to as the *exceptio inadimpleti contractus*) stands for the idea that a condition for one party's compliance with a synallagmatic obligation is the continued compliance of the other party with that obligation. It is connected with a broader principle, that a party ought not to be able to benefit from its own wrong. This was formulated by the Permanent Court in the *Case concerning the Factory at Chorzów (Jurisdiction)* in the following way:

> "It is ... a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him."[607]

The *exceptio* thus operates in the same manner as other circumstances precluding wrongfulness, and it requires consideration here.

Application of the exceptio *in international case law*

315. The application of the *exceptio* was an issue in *Diversion of Water from the Meuse (Netherlands v. Belgium)*.[608] In that case, the Netherlands complained, *inter alia*, about Belgium's taking of water for irrigation and other purposes from a particular lock on the Belgian side, which was said to be unlawful under a bilateral Treaty of 1863. Belgium argued that its use of the lock was not unlawful having regard to the similar use by the Netherlands of a lock on its side. Subsidiarily it argued that, "by constructing certain works contrary to the terms of the Treaty, the Applicant has forfeited the right to invoke the Treaty against the Respondent". The Court upheld the principal Belgian contention, *inter alia*, by comparing the use of the two locks:

> "Neither of these locks constitutes a feeder, yet both of them discharge their lock-water into the canal, and thus take part in feeding it with water otherwise than through the treaty feeder ... In these circumstances, the Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past."[609]

In his separate opinion, Judge Altamira denied that the obligations of the two parties were synallagmatic; accordingly Belgium could not invoke the Netherlands' own conduct as a circumstance precluding wrongfulness.[610] Judges Anzilotti (dissenting) and Hudson disagreed. Judge Anzilotti, referring to Belgium's subsidiary submission, said that:

> "I am convinced that the principle underlying this submission (*inadimplenti non est adimplendum*) is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any case, it is one of these 'general principles

[606] For the text of the proposed article, see para. 656 below.
[607] *P.C.I.J. Series A*, No. 9 (1927), p. 31.
[608] *P.C.I.J. Series A/B*, No. 70 (1937).
[609] Ibid., p. 25.
[610] Ibid., p. 43.

of law recognized by civilized nations' which the Court applies in virtue of Article 38 of its Statute."[611]

Judge Hudson referred both to analogous principles of the English law of equity as well as to civil law sources and said:

> "It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law ... A very similar principle was received into Roman law ... The *exceptio non adimpleti contractus* required a claimant to prove that he had performed or offered to perform his obligation ... [E]ven where a code is silent on the point Planiol states the general principle that 'in any synallagmatic relationship, neither of the two parties may claim a benefit to which it is entitled unless it offers to perform its own obligation'. The general principle is one of which an international tribunal should make a very sparing application. It is certainly not to be thought that a complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness."[612]

316. In the *Appeal Relating to the Jurisdiction of the ICAO Council*, the Court emphasized that a mere allegation by a party to a treaty that another party had committed a material breach of it could not allow the former unilaterally to consider that treaty as terminated or suspended.[613] In his separate Opinion, Judge de Castro expressly referred to the *exceptio inadimpleti contractus* in the context of India's contention that "no question of interpretation or application can arise with regard to a treaty which has ceased to exist or which has been suspended".[614] Relying upon the principle laid down in article 60 of the Vienna Convention on the Law of Treaties, "which follows from the contractual nature of treaties",[615] Judge de Castro said:

> "It should not be overlooked that the rule opens the possibility of raising the *exceptio inadimplenti non est adimplendum*. The breach of an obligation is not the cause of the invalidity or termination of the treaty. It is a source of responsibility and of new obligations or sanctions. Alongside this, it is the material breach of a treaty which entitles the injured party to invoke it in order to terminate or suspend the operation of the treaty."[616]

317. In the *Case concerning the Gabcikovo-Nagymaros Project*, the question arose in a rather specific and unusual form. As noted above, the Court held that Hungary was not justified in suspending and terminating work on the project in the period 1989–1991, but

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[611] Ibid., p. 50.

[612] Ibid, p. 70, citing, *inter alia*, Planiol, *Droit civil*, vol. 2, 6th ed. (1912), p. 320.

[613] *I.C.J. Reports 1972*, p. 42, at p. 67 (para. 38).

[614] Ibid., p. 124.

[615] Ibid., p. 129.

[616] Ibid., p. 128 (footnote). Judge de Castro adds further that "[i]t is the breach of rights or obligations having their source in the agreement which lies at the root of the *exceptio non adimpleti*" (p. 129), thus pointing out the limits of India's contention.

equally that Czechoslovakia was not entitled unilaterally to divert the Danube for the purposes of its "Variant C". Both parties were accordingly in breach of the 1977 Treaty, but the Court declined to allow Hungary to rely on Czechoslovakia's breach (undoubtedly a material breach) as a ground for termination. Relying on the passage from *Chorzów Factory* case, cited above, the Court said it could not:

> "overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct ... Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty."[617]

Subsequently the Court noted that "[t]he principle *ex injuria jus non oritur* is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct."[618] However, it should be noted that while Slovakia's later breach of the Treaty was "caused" by Hungary's earlier breach (in the sense of it being a *causa sine qua non*), it was not caused by the earlier breach in the sense of the *Chorzów Factory* dictum. Instead it was, as the Court held, independently unlawful.

Comparative law underpinnings of the "exceptio"

318. As Judges Anzilotti and Hudson indicated in *Diversion of Waters from the Meuse*, the principle underlying the *exceptio* is widely recognized in national legal systems in respect of reciprocal or synallagmatic obligations, i.e., where it is clear that performance of an obligation by one party is either a precondition or a concurrent condition to the performance of the same or a related obligation by the other party. A cognate situation arises where the breach by one party is consequential upon and directly produced by an earlier breach of the other party (e.g., where a delay in completion of certain work by one party is caused by a delay in delivery of a necessary piece of equipment by the other). Moreover, in national law (just as in the treaty cases cited above), what is at stake appears to be a circumstance precluding wrongfulness in respect of the continued performance of an obligation, rather than its termination. As Treitel notes, after a thorough review of the comparative law experience:

> "The effect of the *exceptio* in CIVIL LAW must be distinguished from that of termination ... Termination brings to an end each party's duty to perform, though the circumstances making the remedy available may give the injured party a right to damages; it also gives the injured party a right to the return of his own performance on restoring what he has received under the contract. The *exceptio* does not produce these effects, but only gives rise to what has been called a 'waiting position'. It is a 'dilatory plea' which does not terminate the contract but merely entitles the injured

[617] *I.C.J. Reports 1997*, p. 7, at p. 67 (para. 110).

[618] Ibid., at p. 76 (para. 133). Among the dissentients on this point, see the declaration of President Schwebel (ibid., p. 85) or the dissenting opinions by Judges Herczegh and Fleischhauer, who both consider as a decisive element the seriousness or lack of proportionality of Czechoslovakia's breach of its obligations as compared to Hungary's: ibid., p. 198 (Judge Herczegh), and p. 212 (Judge Fleischhauer, stressing that "[t]he principle that no State may profit from its own violation of a legal obligation does not condone excessive retaliation"). See also Judge Rezek, at p. 86. But Judge Bedjaoui strongly objects to that view, noting that treaties "cannot be destroyed by violating them. Save by mutual consent, States cannot and may not rid themselves of their treaty obligations so easily" (ibid., p. 138).

party *for the time being* to refuse to perform his part ... The injured party may rely on the *exceptio* both in legal proceedings and extrajudicially. Where the circumstances are such as to justify the injured party's refusal to perform, the court is bound to give effect to the *exceptio*: it has no discretion in the matter — even in those systems (such as the French) in which the remedy of termination is subject to the discretion of the court."[619]

319. The principle of the *exceptio* is also reflected in international commercial law instruments. For example, article 80 of the 1980 UNCITRAL Convention on Contracts for the International Sale of Goods provides simply that:

> "A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission."

It does not seem to matter for the purposes of article 80 whether the act or omission which caused the non-performance was or was not wrongful. The principle is differently formulated, under the rubric of "withholding performance", in article 7.1.3 of the UNIDROIT Principles of International Commercial Contracts, which provides that "[w]here the parties are to perform simultaneously, either party may withhold performance" if the other is not willing and able to perform.

Should the principle be recognized in the draft articles?

320. In his Fourth Report on the law of treaties, Sir Gerald Fitzmaurice discussed the principle in the framework of "circumstances justifying non-performance". He was not certain whether it was properly classified as a justification "*ab extra* by operation of a general rule of international law", or "*ab intra* by virtue of a condition of the treaty implied in it by international law".[620] But he was clear that the principle existed, and indeed he formulated it very broadly:

> "By virtue of the principle of reciprocity, and except in the case of the class of [multilateral treaties of the 'integral' type ... where the force of the obligation is self-existent, absolute and inherent for each party, irrespective and independently of performance by the others], non-performance of a treaty obligation by one party to the treaty will, so long as such non-performance continues, justify an equivalent and corresponding non-performance by the other party or parties."[621]

His commentary was also clear in regarding this as a general principle, not only applicable to treaty obligations:

> "[T]here is a general *international law rule of reciprocity* entailing that the failure of one State to perform its international obligations in a particular respect will either *entitle other States to proceed to a corresponding non-performance* in relation to that State, or will at any rate *disentitle that State from objecting to such corresponding non-performance*."[622]

The commentary goes on to mention the *Case concerning Interpretation of Peace Treaties (Second Phase)*, where the Court declined to apply the principle to a treaty providing for the constitution of an arbitral commission; the wrongful refusal of one party to the dispute

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[619] G. H. Treitel, *Remedies for Breach of Contract. A Comparative Account* (Oxford, Clarendon Press, 1987), pp. 310–311 (emphasis in original); for his review, see pp. 245–317 ("defence of refusal to perform").

[620] Fitzmaurice, Fourth Report, *Yearbook* ... 1959, vol. II, pp. 45, 46.

[621] Ibid., p. 46.

[622] Ibid., p. 70 (emphasis in original).

to appoint its own member was held to prevent the constitution of the commission as a whole, on the ground that:

> "The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties."[623]

This is reminiscent of Czechoslovakia's attempt, in the *Case concerning the Gabcikovo-Nagymaros Project*, to fashion, by way of "approximate application", a version of the project favourable to it when faced with Hungary's wrongful refusal to proceed. The Court rejected the argument, holding that Hungary's breach of the 1977 Treaty could not be remedied by creating a project which was not the kind of project contemplated by the Treaty.[624]

321. The Commission did not debate Fitzmaurice's Fourth Report, nor did his successor, Sir Humphrey Waldock, address the issue. Under his guidance the scope of the Vienna Convention was narrowed so as to deal with the treaty as an instrument, leaving to one side most questions of the performance of treaty obligations. These were reserved to the topic of State responsibility by article 73 of the Vienna Convention.

322. The issue of the *exceptio* was addressed by Mr. Riphagen in the context of countermeasures. In his Fifth Report, he proposed as article 8 of Part Two the following text:

> "Subject to articles 11 to 13, the injured State is entitled, by way of reciprocity, to suspend the performance of its obligations towards the State which has committed an internationally wrongful act, if such obligations correspond to, or are directly connected with, the obligation breached."[625]

In the debate, some members pointed to "the fine and somewhat formalistic distinction between [draft article 8] and the suspension of the performance of treaty obligations".[626] Mr Arangio-Ruiz likewise dealt with the issue as an aspect of countermeasures, noting that:

> "The problem involved here is to see whether practice may justify a distinction of such 'conventional' measures as treaty suspension and termination from countermeasures in general not only for merely descriptive reasons but in view of the legal regime to be codified or otherwise adopted by way of progressive development. As well as the question of the so-called 'reciprocity measures' in general, the issues

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[623] *I.C.J. Reports 1950*, at p. 229, cited by Fitzmaurice, Fourth Report, *Yearbook* ... 1959, vol. II, at p. 71.

[624] Or, as the Court actually put it:

> "even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, variant C does not meet that cardinal condition with regard to the 1977 Treaty ... It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations ... but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse."

I.C.J. Reports 1997, pp. 53–54 (paras. 76, 78). On the so-called "principle of approximate application", see *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, separate opinion of Sir Hersch Lauterpacht, *I.C.J. Reports 1956*, p. 46, and the discussion by Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1984), pp. 95–101.

[625] Riphagen, Fifth Report, *Yearbook* ... 1984, vol. II, Part One, p. 3, and for draft commentary in Riphagen, Sixth Report, *Yearbook* ... 1985, vol. II, Part One, pp. 10–11. Draft article 11 as proposed by Riphagen excluded the application of article 8 in cases of obligations arising from multilateral treaties and affecting the collective interests of the States parties. Draft article 12 was a savings clause dealing with *jus cogens*.

[626] *Yearbook* ... 1984, vol. II, Part Two, p. 103 (para. 373).

> relating to these two 'conventional' measures — issues connected with the relationship between the law of treaties and the law of State responsibility — will have to be the object of further study before any draft articles are formulated."[627]

The Commission decided not to consider reciprocal measures "as a distinct category of countermeasures" on the ground that they "did not deserve special treatment".[628]

Relationship of the exceptio *to other procedures*

323. As this history suggests, in considering whether to include the *exceptio* in Chapter V it is first necessary to ask whether its role is not sufficiently performed by two other procedures. The first of these is countermeasures. Almost by definition, where one State has breached a synallagmatic obligation, the other State's refusal to perform that obligation will be a legitimate countermeasure, since it is very unlikely to be disproportionate and may well be the most appropriate response of all. On the other hand, the *exceptio* has a much more limited application than countermeasures, is not subject to the same limitations and is a more specific response to a particular breach, lacking the opprobrium often associated with countermeasures. A legal system might reject countermeasures, self-help other than in self-defence and reprisals but still find a role for the *exceptio*. Although the Commission has already rejected the category of reciprocal countermeasures, for reasons which are valid enough in that context, that rejection does not exclude the possibility of adopting some version of the *exceptio* in Chapter V of Part One — a possibility the Commission has not yet considered.[629]

324. The second alternative procedure is the suspension of a treaty for breach. Under article 60 (1) of the Vienna Convention on the Law of Treaties, a material breach of a bilateral treaty by one party entitles the other to terminate the treaty, but also to suspend it in whole or in part. In the case of a multilateral treaty, the *only* possibility for a party aggrieved by a material breach is to suspend the treaty in its relations with the defaulting State, since termination is a matter for all the parties to the treaty.[630] Overall the Convention gives considerable emphasis to suspension of treaties, no doubt out of a desire to leave open the possibility of a resumption of treaty relations even after a material breach.[631]

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[627] Arangio-Ruiz, Third Report, document A/CN.4/440, 19 July 1991, para. 35.

[628] ILC report, *Yearbook ...1992*, vol. II, Part Two, p. 23 (para. 151).

[629] See ibid. and commentary to article 47, para. (1), footnote 252.

[630] See article 60 (2) (b) and (c). The rather strict provisions of article 44 on separability do not apply to suspension for breach: see article 44 (2), presumably on the ground that a State which may terminate the whole treaty for breach may suspend less than the whole. This could however lead to unfair results in practice, if a State were to suspend those provisions which imposed obligations on it, while seeking to maintain in force those that gave it rights.

[631] In the *Case concerning the Gabcikovo Nagymaros Project*, the Court seems to have taken the view that Hungary suspended the operation of the 1977 Treaty, apart from any express provision of the Vienna Convention permitting it to do so. It said:

> "The Court cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself ..."

I.C.J. Reports 1997, p. 7, at p. 39 (para. 48). The context suggests that by this it meant that Hungary in substance attempted to suspend the Treaty, despite its own statements that it was acting out of necessity (i.e., on the basis of circumstances precluding wrongfulness). Under article 65 of the Vienna Convention, suspension (like termination) is a formal act. It is slightly odd to describe a State as suspending a treaty when (a) it has never purported to do so, and (b) it is not entitled to do so as a matter of law.

325. There are, however, still differences between reliance on the *exceptio* as a circumstance precluding wrongfulness, and the suspension of a treaty under article 60 or its customary law equivalent. First, article 60 only applies to "material" breaches, rather narrowly defined, whereas the *exceptio* applies to any breach of treaty. Secondly, article 60 allows the suspension of the whole treaty, or (apparently) any combination of its provisions, whereas the *exceptio* only allows non-performance of the same or a closely related obligation. Thirdly, the *exceptio* may also be more readily applied to cases of obligations of simultaneous performance, given the formal procedure for suspension in article 65.[632] And finally, article 60 is of course only concerned with the suspension of treaty obligations, whereas there is no reason to think that the *exceptio*, as it is formulated in the *Factory at Chorzów* dictum, does not apply to all international obligations whatever their origin.

Forms of the exceptio *distinguished*

326. There is thus some, but far from complete, overlap between the *exceptio* and the other doctrines discussed, and this supports the view that — regard being had to the weight of authority behind it and to its general good sense — some version of the *exceptio* ought to be recognized in Chapter V. However, it is necessary here to distinguish at least two different forms of the *exceptio*. One, expressed in the *Factory at Chorzów* dictum[633] and in article 80 of the 1980 UNCITRAL Convention on Contracts for the International Sale of Goods,[634] requires that there be a causal link between the breach of the obligation by State A and its non-performance by State B. The second, broader one is concerned with synallagmatic or interdependent obligations, with each seen as in effect a counterpart of the other: it is as expressed by Judge Hudson in *Diversion of Waters from the Meuse*,[635] in article 7.1.3 of the UNIDROIT Principles of International Commercial Contracts[636] and by Sir Gerald Fitzmaurice in his reports.[637] The position taken by the majority in the *Gabcikovo-Nagymaros* case seems to have been different again,[638] although still a manifestation of the general principle of law that a party cannot be allowed to benefit from its own wrongful act.

327. Looking first at the broader, synallagmatic idea of the *exceptio*, it is clear that this could only be admitted in Chapter V with many qualifications and limitations. These exceptions would include, in Fitzmaurice's words, multilateral treaties of the "integral" type (i.e., where performance is not premised on reciprocity).[639] It could not justify a breach of the rules relating to the use of force or, more generally, a breach of *jus cogens*, and could not stand against any express or clearly implied excluding effect of the primary rule. It could have no application to obligations *erga omnes*, e.g., obligations in the field of human rights, humanitarian law or international criminal law, as was recognized by the International Court in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Counterclaims)*, where it said that:

[632] On the procedure for invoking circumstances precluding wrongfulness see para. 352 below.
[633] See para. 314 above.
[634] See para. 319 above.
[635] See para. 315 above.
[636] See para. 319 above.
[637] See para. 320 above.
[638] See para. 317 above.
[639] See para. 320 above.

> "Bosnia and Herzegovina was right to point to the *erga omnes* character of the obligations flowing from the Genocide Convention ... and the Parties rightly recognized that in no case could one breach of the Convention serve as an excuse for another".[640]

It seems that the effect of the *exceptio*, even in its broader form, is strictly relative and bilateral: in Riphagen's words, it would be limited to breaches which "correspond to, or are directly connected with", the prior breach of the other party.[641]

328. A statement of the synallagmatic form of the *exceptio*, limited in this way, nonetheless presents difficulties of application, as can be seen from the United Nations experience with the monitoring of ceasefire agreements. The difficulties were analysed, for example, in a report of Secretary-General Hammarskjöld of 1956, dealing with the extent to which breaches of any of the Middle East armistice agreements of 1949 could be held to justify a retaliatory breach by the other party (acting other than in immediate self-defence).[642] The report referred to "a chain or actions and reactions ... which, unless broken, is bound to constitute a threat to international peace and security", and continued:

> "[S]ome uncertainty concerning the scope of the obligations of the armistice agreements has, in my view, served to contribute to the unfortunate development ... As a matter of course, each party considers its compliance with the stipulations of an armistice agreement as conditioned by the compliance of the other party to the agreement ... Obviously, therefore, the question of reciprocity must be given serious consideration and full clarity sought. The point of greatest significance in this context is: to what extent can an infringement of one or several of the other clauses of an armistice agreement by one party be considered as entitling the other party to act against the ceasefire clause which is to be found in all the armistice agreements ... The very logic of the armistice agreements shows that infringements of other articles cannot serve as a justification for an infringement of the ceasefire article. If that were not recognized, it would mean that any one of such infringements might not only nullify the armistice regime, but in fact put in jeopardy the ceasefire itself. For that reason alone, it is clear that compliance with the said article can be conditioned only by similar compliance of the other party."[643]

Thus in a context in which there was no strictly causal nexus between one breach and the other, the Secretary-General's view was that only an infringement of a ceasefire obligation specified in a given article could justify what would otherwise be an infringement of that article. Indeed it may be that under the Charter of the United Nations, any underlying entitlement to use force is terminated on the conclusion of a permanent ceasefire, and that thereafter the only exception to the ceasefire obligation is provided by the right of self-defence.[644]

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[640] *I.C.J. Reports 1997*, p. 243, at p. 258 (para. 35). See also, and more emphatically, Judge Weeramantry (dissenting), ibid., at pp. 292–294. The Court went on to hold that nonetheless a counterclaim for genocide could be brought under article 80 of the Rules "in so far [as] the two Parties pursue, with their respective claims, the same legal aim, namely the establishment of legal responsibility for violations of the Genocide Convention": ibid., at p. 258 (para. 35).

[641] See para. 322 above.

[642] S/3596 (*Official Records of the Security Council, Eleventh Year, Supplement for April–June 1956*, pp. 30–66), cited by Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1984), pp. 111–115.

[643] Ibid., paras. 15–18.

[644] See the discussion by J. Lobel and M. Ratner, "By-passing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime", (1990) 93 *AJIL* 124, at pp. 144–152, with references to earlier literature. For the Secretary-General the problem was partly

329. The underlying problem is that a broad view of the *exceptio* may produce escalating non-compliance, negating for practical purposes the continuing effect of the obligation. For these reasons the Special Rapporteur is firmly of the view that the justification for non-compliance with synallagmatic obligations should be resolved (a) by the law relating to the suspension or termination of those obligations (which is sufficient to deal with most problems of treaty obligations), and (b) by the law of countermeasures. The question then becomes whether the narrower form of the *exceptio*, as recognized by the Court in the *Factory at Chorzów* dictum,[645] should be included in Chapter V. There is certainly a case for doing so, both as a matter of authority or tradition and as a matter of ordinary common sense. To facilitate debate, the Special Rapporteur proposes that Chapter V should include a provision to the effect that the wrongfulness of an act of a State is precluded if it has been prevented from acting in conformity with the obligation in question as a direct result of a prior breach of the same or a related international obligation by another State.[646]

(c) The so-called "clean hands" doctrine

330. Finally, some brief reference should be made to the so-called "clean hands" doctrine, which has sometimes been relied on as a "defence", or at least as a ground of inadmissibility of a claim, in State responsibility cases — mostly, though not always, in the framework of diplomatic protection. For example, in his dissenting opinion in *Military and Paramilitary Activities in and against Nicaragua*, Judge Schwebel relied on the doctrine as a subsidiary basis for dismissing Nicaragua's claim.[647] The majority did not refer directly to the point.

331. The doctrine has hardly been referred to in the Commission's previous work on State responsibility. Special Rapporteur García Amador dealt with it only in relation to "Fault on the part of the alien", which is now subsumed in Part Two, article 42 (2), as a basis for limiting the amount of reparation due.[648] To the extent that "clean hands" may sometimes be a basis for rejecting a claim of diplomatic protection,[649] the doctrine appears to operate as a ground of inadmissibility rather than as a circumstance precluding wrongfulness or responsibility, and it can be left to be dealt with under the topic of diplomatic protection.

332. Even within the context of diplomatic protection, the authority supporting the existence of a doctrine of "clean hands", whether as a ground of admissibility or otherwise, is, in Salmon's words, "fairly long-standing and divided".[650] It deals largely with individuals involved in slave-trading and breach of neutrality, and in particular a series of decisions of the United States-Great Britain Mixed Commission set up under a Convention of 8 February 1853 for the settlement of shipowners' compensation claims. According to Salmon, in the cases where the claim was held inadmissible:

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jurisdictional, since his specific authority in the Middle East was to supervise the armistice agreements as such.

645 See para. 314 above.

646 For the proposed provision, see para. 356 below.

647 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986*, p. 14, at pp. 392–394.

648 *Yearbook* ... 1958, vol. II, p. 47, at pp. 53–54.

649 As was the case in two awards cited by Judge Schwebel, *I.C.J. Reports 1986*, p.14, at pp. 393–394 (para. 270): viz., the *Clark* claim (1865), in J. B. Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party*, vol. III (Buffalo, NY, William S. Hein, 1995), pp. 2738–2739, and the *Pelletier* claim, *Foreign Relations of the United States*, 1887, p. 607. A similar argument was raised in the *Barcelona Traction* case: see *Pleadings*, vol. X, p. 11, but was not discussed by the Court itself in either phase of that case.

650 J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, vol. 10, p. 225 (1964) at p. 249.

"In any event, it appears that these cases are all characterized by the fact that the breach of international law by the victim was the sole cause of the damage claimed, [and] that the cause-and-effect relationship between the damage and the victim's conduct was pure, involving no wrongful act by the respondent State. When, on the contrary, the latter has in turn violated international law in taking repressive action against the applicant, the arbitrators have never declared the claim inadmissible."[651]

333. It is true that legal principles based on the underlying notion of good faith can play a role in international law. These include the principle (which underlines the *exceptio*) that a State may not rely on its own wrongful conduct, and the principle *ex turpi causa non oritur actio*. Such principles may be capable of generating new legal consequences within the field of responsibility, as the former appears to have done in the *Case concerning the Gabcikovo-Nagymaros Project*.[652] But this does not mean that new and vague maxims such as the "clean hands" doctrine should be recognized in Chapter V. According to Sir Gerald Fitzmaurice:

> "[A] State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality — in short, were provoked by it. In some cases, the principle of legitimate reprisals will remove any aspect of illegality from such counteraction."[653]

But Chapter V is not concerned with such procedural questions as *locus standi*, or with the admissibility of claims. And it is significant that even in the above passage it is not suggested that the illegal conduct of an injured State (still less its lack of "clean hands") is a distinct circumstance precluding the wrongfulness of the conduct which caused injury to that State.

334. For these reasons there is in the Special Rapporteur's view no basis for including the clean hands doctrine as a new "circumstance precluding wrongfulness", distinct from the *exceptio* or from countermeasures. On the contrary, the conclusion reached by Charles Rousseau seems still to be valid: "it is not possible to consider the 'clean hands' theory as an institution of general customary law".[654]

5. Procedural and other incidents of invoking circumstances precluding wrongfulness

335. The only provision in Chapter V which deals with the incidents or consequences of invoking a circumstance precluding wrongfulness is article 35. This contrasts with the rather elaborate provisions in the Vienna Convention on the Law of Treaties dealing with the consequences of invoking a ground for invalidity, termination or suspension of a treaty. A number of different issues need to be considered, beginning with article 35 itself.

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[651] Ibid., at p. 261. See also L. Garcia Arias, "La doctrine des 'clean hands' en droit international public", *Annuaire de l'Association des Auditeurs et des Anciens Auditeurs de l'Académie de droit international*, vol. 30 (1960), p. 18; A. Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux", in *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189.

[652] See para. 317 above.

[653] G. Fitzmaurice, "The General Principles of International Law considered from the Standpoint of the Rule of Law", *Recueil des cours ...*, vol. 92 (1957-II), p. 119, quoted by Judge Schwebel, *I.C.J. Reports 1986*, p. 14, at p. 394 (para. 271).

[654] C. Rousseau, *Droit international public. Tome V. Les rapports conflictuels*, 5e éd. (Paris, Sirey, 1983), §170.

(a) Compensation for losses in cases where Chapter V is invoked

336. The terms of article 35 have already been set out.[655] As its title suggests, the article is a reservation as to questions of possible compensation for damage in certain cases covered by Chapter V. It does not confer any rights to compensation, although in relation to the two cases not mentioned, countermeasures and self-defence, by clear implication it excludes any such rights.

337. The brief commentary to article 35 notes that the issue of a reservation with respect to damage first arose in the discussion in 1979 of article 31 dealing with *force majeure*. Because such a proviso was relevant to other provisions of Chapter V it was set aside and only reconsidered in 1980. Although the possibility of compensation was argued "forcefully" in connection with the state of necessity,[656] article 35 was eventually included as "a reservation in quite general terms", applicable to all the circumstances in Chapter V except self-defence and countermeasures.[657] But it was emphasized that the inclusion of article 35 did not "prejudge any of the questions of principle that might arise in regard to the matter, either with respect to the obligation to indemnify, which would be considered in the context of part 2 of the present draft", or the location of the article.[658] Nor was there any discussion of State practice or doctrine on the point, either in the commentary or in the debate following the Drafting Committee's proposal of article 35.[659]

Comments of Governments on article 35

338. Austria suggests that article 35 be reformulated to avoid undercutting Chapter V as a whole. Only where international law independently provides for compensation should that possibility arise.[660] France goes further, proposing the deletion of article 35 on the ground that it "envisages no-fault liability".[661] Germany appears to envisage that compensation should be limited to the case of necessity under article 33.[662] The United Kingdom welcomes article 35 as applied to cases (such as necessity) where the circumstance precluding wrongfulness operates as an excuse rather than a justification.[663] Japan too supports the principle, but suggests the use of a different term than "compensation", which is an aspect of reparation for wrongful acts under Part Two.[664]

Is there room for a principle of compensation for loss when circumstances preclude wrongfulness?

339. The commentary takes a very reserved position with respect to article 35, which it regards as a mere "without prejudice" clause. In part this may have been in the expectation that the issue would be dealt with in Part Two, but this did not occur. As Japan points out, however, article 35 is not concerned with compensation within the framework of reparation

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[655] See para. 303 above.

[656] Commentary to article 35, para. (3).

[657] Ibid., para. (4).

[658] Ibid.

[659] But for a case where compensation was awarded even though the wrongfulness of the conduct was precluded, see the *Company General of the Orinoco* case, UNRIAA, vol. X, p. 280 (1905), cited in commentary to article 33, para. (17).

[660] A/CN.4/488, p. 89.

[661] Ibid.

[662] Ibid., p. 90.

[663] Ibid., p. 90.

[664] A/CN.4/492, p. 12.

for wrongful conduct, which is the subject of Part Two. Rather it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any actual losses suffered by any State directly affected by that reliance. That is a perfectly proper condition, in principle, for allowing the former State to rely on a circumstance precluding wrongfulness. It has nothing to do with the general issue of whether a State may be "liable" for injuries caused by lawful activities causing harm to other States, which has been the subject of a separate topic. Under the secondary rules of responsibility, which are the proper subject of the present draft articles, a State would normally be required to make full reparation to an injured State for conduct which (in terms of article 16) is not in compliance with its international obligations.[665] If the draft articles define circumstances in which the putatively injured State is not so entitled, it is perfectly proper that they should do so subject to the proviso that any actual losses suffered by that State, and for which it is not itself responsible, should be met by the invoking State. Formally this falls within the scope of the secondary rules of responsibility, since it relates to a situation where State responsibility prima facie arises in terms of the draft articles, but the draft articles go on expressly to exclude that responsibility.[666] As a matter of substance, the case for such a condition is that, without it, the State whose conduct would otherwise be unlawful would be able to shift the burden of the defence of its own interests or concerns on to an innocent third State.

340. This was accepted by Hungary in invoking the plea of necessity in the *Case concerning the Gabcikovo-Nagymaros Project*. It would have been unconscionable for Hungary to have sought to impose on Czechoslovakia the whole cost of the cancellation of a joint project, where the cancellation occurred for reasons which were not (or at least not only) attributable to Czechoslovakia. As the Court noted:

> "Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner."[667]

Because the plea of necessity was rejected on other grounds, the precise scope of such compensation in the circumstances of the case was not decided.[668]

To which of the circumstances in Chapter V should article 35 apply?

341. For these reasons there is no a priori reason for excluding article 35 from the draft articles. If its retention implies that at least some of the circumstances in Chapter V are circumstances precluding responsibility rather than wrongfulness, then that too is within the province of the secondary rules of responsibility, just as it would be if they were to be conceptualized as circumstances mitigating responsibility.[669] Thus the question becomes one of determining which of the circumstances dealt within Chapter V give rise, or might give rise, to the possibility of compensation for actual losses incurred, and how article 35 should be formulated.

342. It is clear that article 35 should not apply to self-defence or countermeasures, since those circumstances depend upon and relate to prior wrongful conduct of the "target" State, and there is no basis to compensate it for the consequences of its own wrongful conduct.

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[665] See para. 14 above.

[666] See the dictum of the International Court in the *Case concerning the Gabcikovo-Nagymaros Project*, quoted in para. 226 above.

[667] *I.C.J. Reports 1997*, p. 7, at p. 39 (para. 48).

[668] There is a separate issue, which is that of accounting for accrued costs and damages: see *I.C.J. Reports*, 1997, p. 7, at p. 81 (paras. 152–153).

[669] See para. 228 above.

If consent were to be retained as a circumstance precluding wrongfulness, it too ought to be excluded from the scope of article 35. A State whose consent is the basis for the conduct of another State (e.g., overflight, or its occupation of territory) is of course entitled to make its consent conditional on the payment of a fee, or rental, or compensation for harm incurred: this is a matter for negotiation at the time consent is given. However, for the reasons given above, there is no place for article 29 within the framework of Chapter V.[670]

343. That leaves the three circumstances (*force majeure*, distress, necessity) which are in principle independent of the conduct or will of the putatively injured State. As to *force majeure*, this is defined as the occurrence of an "irresistible force or an unforeseen external event beyond the control of the State, making it materially impossible in the circumstances to perform the obligation"; moreover, the invoking State must not have contributed to the occurrence of the situation of *force majeure* by its own wrongful conduct, and it must not have assumed the risk of the *force majeure* event occurring.[671] In these circumstances there seems to be no reason to require the invoking State to assume any special obligation of compensation. Circumstances beyond its control have made it materially impossible to perform, and it has not accepted the sole risk of their occurrence.[672] Conversely — and as noted above — there is a strong case for compensation for actual loss where a State relies on necessity, provided at least that the other State has not itself through its own default or neglect produced the situation of necessity.

344. As to distress, in the Special Rapporteur's view this is closer to the plea of necessity than it is to *force majeure*. Assume a vessel in distress of weather and already damaged which puts into a foreign port in order to save the lives of the crew. Why should the vessel not be required to pay for any injury to port installations (e.g., arising from fuel oil leaking from a ruptured tank)? To require it to do so may facilitate reliance on distress as a basis for saving lives, which must be in the general interest.

345. As to the two additional circumstances proposed to be added to Chapter V, it is suggested that neither needs to be mentioned in article 35. Compliance with peremptory norms is of common interest and concern to all States in the international community, and there is no reason why one State should be required to compensate any other for the exigencies of complying with that common responsibility. As to the *exceptio*, like countermeasures this is dependent on the wrongful conduct of the "target" State and there is no case for countermeasures. For these reasons the Special Rapporteur would limit the scope of article 35 to distress and necessity.

Issues of formulation: a right or a mere reservation?

346. The remaining question is whether, as to distress and necessity, article 35 should be formulated as a positive right or as a reservation. There are difficulties with the former, however, since the range of cases varies so much and since practice is scarce. On balance it is proposed to retain the form of a savings clause, but to strengthen the language to some extent to make it clear that an innocent third State is not expected to bear alone any actual losses arising from the invocation of distress or necessity.

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[670] See para. 241 above.

[671] See paras. 261–263 above, and for the terms of article 31, para. 356 below.

[672] Where the *force majeure* results from coercion by a third State, that State may be responsible for the consequences to the putatively injured State: see the present report, A/CN.4/498/Add.1, para. 202. As between the invoking State and the third State, clearly the latter should bear responsibility.

Conclusions on article 35

347. For these reasons article 35 should be retained in relation to distress and necessity. The invocation of those circumstances should be "without prejudice ... to the question of financial compensation for any actual harm or loss caused by" the act of the invoking State.[673]

(b) Temporal effect of invoking circumstances precluding wrongfulness

348. The commentary to the various draft articles in Chapter V makes it clear that they only preclude wrongfulness (and thus responsibility) for as long as the circumstances in question continue to exist and to satisfy the conditions laid down for their invocation. The same principle was affirmed by the Tribunal in the *Rainbow Warrior* case and by the International Court in the *Case concerning the Gabcikovo-Nagymaros Project*.[674] Although probably implicit in Chapter V as adopted on first reading, it is of such significance that it should be spelled out expressly. Of course it may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation (e.g., a breach of a treaty justifying countermeasures may be "material" in terms of article 60 of the 1969 Vienna Convention and permit termination of the treaty). Conversely, the obligation may be fully reinstated or its operation fully restored in principle, but modalities for resuming performance may need to be settled. These are not matters which the draft articles can or should resolve, but at least it should be provided that the invocation of circumstances precluding wrongfulness is without prejudice to "the cessation of any act not in conformity with the obligation in question, and subsequent compliance with that obligation, if and to the extent that the circumstance precluding wrongfulness no longer exists".[675]

(c) Onus of proof

349. In principle, State responsibility is not to be presumed, and the onus of establishing such responsibility lies on the State which asserts it.[676] However, where conduct in conflict with an international obligation of a State is attributable to that State and it seeks to avoid its responsibility by relying on some circumstance under Chapter V, the position changes and the onus lies on that State to justify or excuse its conduct. In addition, it will often be the case that only the invoking State is fully aware of the circumstances of the case. It seems that this result is sufficiently achieved by the existing language of Chapter V, and that no further provision is required.

(d) Loss of the right to invoke responsibility

350. The suggestion has been made that the draft articles should cover the question of loss of the right to invoke responsibility, by analogy with article 45 of the Vienna Convention on the Law of Treaties, which deals with "Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty". A number of earlier codification attempts included elements which are appropriately dealt with under this rubric, in particular the "acceptance of non-performance by the other party or parties".[677] On the

[673] See para. 356 below.

[674] See para. 224 above.

[675] See para. 356 below.

[676] As Arbitrator Huber said in the *Spanish Zone of Morocco Claims*, "the international responsibility of the State is not to be presumed"; see UNRIAA, vol. II, p. 615.

[677] Fitzmaurice, Fourth Report, *Yearbook* ... 1959, vol. II, pp. 44, 63. See paras. 215, 237 above.

other hand, this issue only arises if responsibility has already been incurred, i.e., if all the conditions for the international responsibility of a State have been satisfied. It therefore belongs properly to Part Two of the draft articles and will be discussed in that framework.

(e) Dispute settlement in relation to circumstances precluding wrongfulness

351. Because the effect of the circumstances dealt with in Chapter V is to preclude a responsibility which would otherwise exist in relation to some other State or States, the question of settlement of disputes naturally arises. This is manifested, for example, by the linkage which already exists in Part Two between countermeasures and dispute settlement, and also by the linkage that the States participating in the Vienna Conference on the Law of Treaties insisted on creating between invocation of *jus cogens* under articles 53 and 64 and dispute settlement.[678]

352. It is true that the issue of dispute settlement arises generally with respect to the draft articles as a whole, and especially Part Three. But whatever conclusion may be reached with respect to Part Three, there is a procedural issue for Chapter V which arises by analogy with article 65 of the Vienna Convention on the Law of Treaties. If a State seeks to rely on a circumstance precluding wrongfulness, i.e., in order to excuse what would otherwise be a breach of international law, it should, as a minimum, promptly inform the other State or States of that fact, and of the consequences for its performance of the obligation. It should then be a matter for the States concerned to seek to resolve any questions arising, by the procedures provided for in the Charter of the United Nations and in particular by article 33. The matter will have to be returned to in the context of Part Three of the draft articles, but a provision to this effect should, for the time being at least, be included in Chapter V.[679]

6. Conclusions as to Chapter V

353. At the outset of this discussion of Chapter V, it was noted that the circumstances dealt with probably fell into several categories, and that at least with respect to certain of them it might be more appropriate to speak of circumstances precluding responsibility than wrongfulness.[680] At least with respect to *force majeure*, distress and necessity, an alternative formulation for the purposes of Chapter V might be "A State is not responsible for its failure to perform an international obligation if the failure is due to" one of those circumstances. This could contrast with the formulation in the case of self-defence, and possibly countermeasures, where it could be said that the circumstance precludes wrongfulness (and therefore the very idea of "failure"). The conflicting requirements of a peremptory norm, and the *exceptio* in the narrow formulation proposed, would no doubt fall in the latter category as well. But on balance the Special Rapporteur is not persuaded that a categorical distinction needs to be made as between the circumstances to be covered by Chapter V. There is in truth a range of cases, and a clear example of distress or even necessity may be more convincing as a circumstance precluding wrongfulness than a marginal case of self-defence. It seems sufficient to deal with all the circumstances under the existing general rubric of Chapter V, making the specific distinctions and qualifications between them that have been proposed.

354. A second question, left open in the discussion of article 16, is that of the relationship between that article and Chapter V.[681] It would be inelegant, and would tend to give too

[678] Cf. also the dictum of the Arbitral Tribunal in the *Rainbow Warrior* case, para. 269 above.

[679] For the proposed provision see para. 356 below.

[680] See paras. 221–229 above.

[681] See para. 14 above.

much emphasis to the issue of excuses for non-performance, to make article 16 (and *a fortiori* articles 1 or 3) expressly subject to Chapter V. Articles 1 and 3 are in the nature of a statement of principle, like article 26 of the Vienna Convention on the Law of Treaties (*pacta sunt servanda*), and in the context of the draft articles as a whole there is no need for them to contain further qualifications. The phrase "under international law", proposed by France for inclusion in article 16, is a sufficient qualification for the purposes of that article.[682] France had also proposed that Chapter V be brought, in the form of a single article, within Chapter III.[683] It is not desirable to compress Chapter V into a single article, but it may be that present Chapters III, IV and V could be subsections of a single Chapter dealing with breach of an international obligation. The Drafting Committee may wish to consider the possibility.

355. Finally there is the question of the order of the various circumstances included in Chapter V. The original order was consent, countermeasures, *force majeure*, distress, necessity and self-defence (an order which may have owed something to the historical link between self-defence and necessity[684]). Under modern international law, however, self-defence has more in common with countermeasures than necessity, and should be grouped with it. So too does the *exceptio inadimpleti contractus*, which likewise constitutes a response to unlawful conduct by the State against which the circumstance is invoked. On balance it seems appropriate to list the circumstances now to be covered in Chapter V in two sub-groups: first, compliance with a peremptory norm, self-defence, countermeasures and the *exceptio*; followed by *force majeure*, distress and necessity, and then by the ancillary clauses discussed above.

356. For the reasons given, the Special Rapporteur proposes the following articles in Chapter V. The notes appended to each article explain very briefly the changes that are proposed.

Chapter V

Circumstances precluding wrongfulness

~~Article 29~~

~~Consent~~

Note: *Former article 29 dealt with consent validly given as a circumstance precluding wrongfulness. In many cases, the consent of a State, given in advance of an act, is sufficient to legalize the act in international law, for example, consent to overflight over territory, etc. In other cases consent given after the event may amount to a waiver of responsibility, but will not prevent responsibility from arising at the time of the act. Thus either consent is part of the defining elements of a wrongful act, or it is relevant in terms of the loss of the right to invoke responsibility. In neither case is it a circumstance precluding wrongfulness, and accordingly article 29 has been deleted. See further paragraphs 235 to 241 above.*

[682] See paras. 8, 14 above.

[683] See para. 216 above.

[684] See the discussion of the *Caroline* case, para. 278 above.

Article 29 *bis*

Compliance with a peremptory norm (*jus cogens*)

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is required in the circumstances by a peremptory norm of general international law.

Notes. *1. Just as a peremptory norm of international law invalidates an inconsistent treaty, so it must have the effect of excusing non-compliance with an obligation in those rare — but nonetheless conceivable — circumstances where an international obligation, not itself peremptory in character, is overridden by an obligation which is peremptory. For example, a right of transit or passage across territory could not be invoked if the immediate purpose of exercising the right was unlawfully to attack the territory of a third State. See paragraphs 306 to 313 above.*

2. Peremptory norms of general international law are defined by the Vienna Convention on the Law of Treaties of 1969, article 53, as norms from which no derogation is permitted other than by subsequent norms of the same status. It is not thought necessary to repeat this definition in article 29 bis.

3. Article 29 bis only applies where the conflict between a peremptory norm and some other obligation is clear and direct in the circumstances that have arisen. The act which is otherwise wrongful must be specifically required by the peremptory norm in the circumstances of the case, so as to leave the State concerned no choice of means and no way of complying with both obligations.

4. The question of dispute settlement in relation to article 29 bis will be considered in the context of Part Three of the draft articles.

Article 29 *ter*

Self-defence

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

2. Paragraph 1 does not apply to international obligations which are expressed or intended to be obligations of total restraint even for States engaged in armed conflict or acting in self-defence, and in particular to obligations of a humanitarian character relating to the protection of the human person in time of armed conflict or national emergency.

Notes. *1. Paragraph 1 is unchanged from that provisionally adopted on first reading.*

2. Paragraph 2 has been added to draw a distinction between those obligations which constrain even States acting in self-defence (especially in the field of international humanitarian law) and those which, while they may be relevant considerations in applying the criteria of necessity and proportionality which are part of the law of self-defence, are not obligations of "total restraint". The language of paragraph 2 adapts that of the International Court in the advisory opinion concerning Threat or Use of Nuclear Weapons, *I.C.J. Reports 1996, at p. 242 (para. 30). The additional phrase specifying obligations of a humanitarian character draws on article 60 of the Vienna Convention on the Law of Treaties and is intended to single out, by way of example, the most important category of these obligations of total restraint. See paragraphs 296 to 302 above.*

3. The location of this article is changed to bring it into relation with articles 29 bis and 30 and to emphasize the importance of the "inherent right" of self-defence in the system of the Charter of the United Nations.

Article 30

Countermeasures in respect of an internationally wrongful act

[The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.]

Note. *Legitimate countermeasures preclude the wrongfulness of the conduct in question, vis-à-vis the State whose wrongful conduct has prompted the countermeasures. However, the drafting of article 30 depends on decisions still to be taken on second reading in relation to the inclusion and formulation of the articles in Part Two which deal in detail with countermeasures. Article 30 is retained in square brackets pending consideration of the issue of countermeasures as a whole.*

Article 30 *bis*

Non-compliance caused by prior non-compliance by another State

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the State has been prevented from acting in conformity with the obligation as a direct result of a prior breach of the same or a related international obligation by another State.

Notes. *1. Article 30 bis reflects the principle expressed in the maxim* exceptio inadimplenti non est adimplendum *(or in the case of treaty obligations,* exceptio inadimpleti contractus*). It bears a certain relationship with countermeasures, in the sense that the later act (otherwise wrongful) of State A is conditioned upon and responds to the prior wrongful act of State B. But in the case of the* exceptio*, the link between the two acts is immediate and direct. As expressed by the Permanent Court in the* Chorzów Factory *case, the principle only applies where one State has, by its unlawful act, actually prevented the other from complying with its side of the bargain, i.e., from complying with the same or a related obligation. In other words, the link is a direct causal link, and certainly not a question of one breach provoking another by way of reprisal or retaliation. For example, where State A by failure to complete its share of joint works causes State B itself to fall behind the agreed schedule, State A cannot complain of the latter delay, for it would then in effect be seeking to rely on its own wrongful act. See paragraphs 314 to 329 above.*

2. Because of this direct causal link between the two acts, it is not necessary to include the various restrictions on legitimate countermeasures which apply under Part Two of the draft articles as adopted on first reading. The principle is a very narrow one, with its own built-in limitations. In particular it only applies if the prior breach is established, if it is causally linked to the later act and if the breaches concern the same or related obligations. For this purpose an obligation may be related either textually (as part of the same instrument) or because it deals with the same subject matter or the same particular situation. See paragraph 326 above.

3. Consideration was given to including in article 30 bis the slightly wider situation of synallagmatic obligations, i.e., obligations (usually contained in a treaty) of such a character that continued compliance with the obligation by one State is conditioned upon

similar compliance by the other State. In such a case there is no direct causal link between non-performance by State A and non-performance by State B. It remains possible for State B to comply, but to do so would contradict the expectations underlying the agreement. An example would be a ceasefire agreement, or an agreement for exchange of prisoners or mutual destruction of weapons. However, it is thought that this situation is adequately dealt with by a combination of other rules: treaty interpretation, the application of countermeasures and the possibility of suspension or even termination of the treaty for breach. See paragraphs 327 to 329 above.

Article 31

Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*. For the purposes of this article, *force majeure* is the occurrence of an irresistible force or an unforeseen external event beyond the control of the State making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) The occurrence of *force majeure* results, either alone or in combination with other factors, from the wrongful conduct of the State invoking it; or

(b) The State has by the obligation assumed the risk of that occurrence.

Notes. *1. Article 31 was originally entitled "*Force majeure *and fortuitous event", but by no means all cases of fortuitous event qualify as excuses, whereas* force majeure *as defined does sufficiently cover the field. The title to article 31 has been correspondingly simplified, without loss of content in the article itself.*

2. As originally drafted, paragraph 1 also covered cases of force majeure *which made it impossible for the State "to know that its conduct was not in conformity with" the obligation. This added a confusing subjective element and appeared to contradict the principle that ignorance of wrongfulness (i.e., ignorance of law) is not an excuse. The words were intended to cover cases such as an unforeseen failure of navigational equipment causing an aircraft to intrude on the airspace of another State. The words "in the circumstances" are intended to cover this situation without the need to refer to knowledge of wrongfulness. See paragraph 260 above.*

3. As adopted on first reading, paragraph 2 provided that the plea of force majeure *"shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility". But* force majeure *is narrowly defined in paragraph 1, and this additional limitation seems to go too far in limiting invocation of* force majeure. *Under the parallel ground for termination of a treaty in article 61 of the Vienna Convention on the Law of Treaties, material impossibility can be invoked "if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty". By analogy with this provision, paragraph 2 (a) excludes the plea of* force majeure *in cases where the State has produced or contributed to producing the situation through its own wrongful conduct. See paragraph 261 above.*

4. In addition, it is conceivable that by the obligation in question the State may have assumed the risk of a particular occurrence of force majeure. *Paragraph 2 (b) excludes the plea of* force majeure *in such cases. See paragraph 262 above.*

Article 32

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question reasonably believed that there was no other way, in a situation of distress, of saving that person's own life or the lives of other persons entrusted to his or her care.

2. Paragraph 1 does not apply if:

(a) The situation of distress results, either alone or in combination with other factors, from the wrongful conduct of the State invoking it; or

(b) The conduct in question was likely to create a comparable or greater peril.

Notes. *1. This article is substantially as proposed on first reading. Certain changes have however been made. First, the State agent whose action is in question must have reasonably believed, on the information available or which should have been available, that life was at risk. The previous standard was entirely objective, but in cases of genuine distress there will usually not be time for the medical or other investigations which would justify applying an objective standard.*

2. Secondly, in parallel with the proposed article 31 (2) (a), a new version of article 32 (2) (a) is proposed, and for substantially the same reasons. It will often be the case that the State invoking distress has "contributed" even if indirectly to the situation, but it seems that it should only be precluded from relying on distress if that State has contributed to the situation of distress by conduct which is actually wrongful.

3. Thirdly, the requirement that the distress be "extreme" has been deleted. It is not clear what it adds, over and above the other requirements of article 32. See paragraphs 271 to 274 above.

Article 33

State of necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless:

(a) The act is the only means of safeguarding an essential interest of that State against a grave and imminent peril; and

(b) The act does not seriously impair:

(i) An essential interest of the State towards which the obligation existed; or

(ii) If the obligation was established for the protection of some common or general interest, that interest.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question arises from a peremptory norm of general international law; or

(b) The international obligation in question explicitly or implicitly excludes the possibility of invoking necessity; or

(c) The State invoking necessity has materially contributed to the situation of necessity occurring.

Notes. *1. Article 33 corresponds to the text adopted on first reading, with certain drafting amendments. For the most part these are minor in character. For example, like other articles in Chapter V, article 33 should be expressed in the present tense, and there is no need to refer to the "state of necessity" in the text, the term "necessity" sufficing.*

2. Three changes should be noted. First, paragraph 1 (b) has been reformulated to make it clear that the balance to be struck in cases where the obligation is established in the general interest (e.g., as an obligation erga omnes*) is that very interest. Secondly, paragraph 2 (b) is no longer confined to treaty obligations. Thirdly, paragraph 2 (c) uses the phrase "materially contributed", since in the nature of things the invoking State is likely to have contributed in some sense to the situation, and the question is whether that contribution is sufficiently material to disentitle it to invoke necessity at all. See paragraphs 290 and 291 above.*

Article 34

Self-defence

Note. *See current article 29 ter.*

Article 34 *bis*

Procedure for invoking a circumstance precluding wrongfulness

1. A State invoking a circumstance precluding wrongfulness under this Chapter should, as soon as possible after it has notice of the circumstance, inform the other State or States concerned in writing of it and of its consequences for the performance of the obligation.

[2. If a dispute arises as to the existence of the circumstance or its consequences for the performance of the obligation, the parties should seek to resolve that dispute:

(a) In a case involving article 29 *bis*, by the procedures available under the Charter of the United Nations;

(b) In any other case, in accordance with Part Three.]

Note. *Chapter V as adopted on first reading made no provision for the procedure for invoking circumstances precluding wrongfulness, or for settlement of disputes. The latter issue will be discussed in relation to Part Three of the draft articles, and paragraph 3 of article 34* bis *is included* pro memoria, *pending further discussion of issues of dispute settlement. However, if a State wishes to invoke a circumstance precluding wrongfulness, it is reasonable that it should inform the other State or States concerned of that fact and of the reasons for it, and paragraph 1 so provides. See paragraphs 351 and 352 above.*

Article 35

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness under this Chapter is without prejudice:

(a) To the cessation of any act not in conformity with the obligation in question, and subsequent compliance with that obligation, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) In the case of articles 32 and 33, to the question of financial compensation for any actual harm or loss caused by that act.

Notes. *1. Article 35 as adopted on first reading contained a reservation as to compensation for damage arising from four of the circumstances precluding wrongfulness, viz., under articles 29 (consent), 31 (*force majeure*), 32 (distress) and 33 (state of necessity). Article 29 is recommended for deletion (and listing it in article 35 was questionable in any event). In the case of* force majeure, *the invoking State is acting subject to external forces making it materially impossible to perform the obligation, and it has not assumed the sole risk of non-performance. But in the case of articles 32 and 33, there is at least a measure of choice on the part of the invoking State, whereas the State or States which would otherwise be entitled to complain of the act in question as a breach of an obligation owed to them have not contributed to, let alone caused, the situation of distress or necessity, and it is not clear why they should be required to suffer actual harm or loss in the interests of the State invoking those circumstances. Accordingly article 35 has been retained in relation to distress and necessity. Without entering into detail on questions of compensation, its language has been modified slightly to make it less neutral and anodyne, as well as to avoid technical difficulties with the terms "damage" and "compensation". See paragraphs 339 to 347 above.*

2. In addition, article 35 (a) has been added to make it clear that Chapter V has a merely preclusive effect. When and to the extent that a circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming it is still in force) will again have to be complied with, and the State whose earlier non-compliance was excused must act accordingly. See paragraph 348 above.

3. In consequence of the broader scope of article 35, its title has been changed.